# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1979

No. 79-73

ADELAIDE SHIPPING LINES, LTD.,
SALEN REEFER SERVICES AB, and M. V. GLADIOLA,
*Petitioners,*

vs.

SUNKIST GROWERS, INC.,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI
**to the United States Court of Appeals for the Ninth Circuit**

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Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, first entered in this case March 8, 1979, as to which rehearing was denied April 19, 1979.

## OPINIONS BELOW

The findings and opinion of Judge Orrick of the United States District Court for the Northern District of California delivered orally are not officially reported[1] but are

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[1]Judge Orrick's opinion is reported as *Sunkist Growers v. Adelaide Shipping Lines* at 1976 A.M.C. 2597 (N.D. Cal. 1976).

set forth in Appendix A, *infra,* at pages 1A through 14A. The opinion of the United States Court of Appeals for the Ninth Circuit, which will be officially reported, is set forth in Appendix B, *infra,* at pages 1B through 33B. The Order of the Court of Appeals denying Appellees' petition for rehearing is set forth in Appendix C, *infra,* at page 1C.

## JURISDICTION

On March 8, 1979 the Court of Appeals entered its judgment reversing the decision of the district court exonerating petitioners from liability under the terms of the Fire Statute and the Carriage of Goods By Sea Act. A petition for rehearing was timely filed April 3, 1979 and was denied April 19, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. section 1254(1).

## QUESTIONS PRESENTED

1. Even though the Carriage of Goods by Sea Act (46 U.S.C. §§ 1300 *et seq.*) contains a saving clause (46 U.S.C. § 1308) which states that the provisions of COGSA "shall not affect the rights and obligations of the carrier" under the Limitation of Liability Act (46 U.S.C. §§ 181 *et seq.*), did the enactment of COGSA amend the earlier Limitation of Liability statute so as to make the defense of the Fire Statute (46 U.S.C. § 182) unavailable except upon the condition that the shipowner first demonstrate compliance with the provision of COGSA that "before and at the beginning of the voyage" it "exercise due diligence to . . . [m]ake the ship seaworthy"?

2. Is the fire exception of COGSA, 46 U.S.C. § 1304(2)(b), to be interpreted as meaning something different from



the Fire Statute, 46 U.S.C. § 182, the effect of which was expressly saved by COGSA in 46 U.S.C. section 1308?

3. If the answer to question No. 2 is affirmative and COGSA is to be read differently from the Fire Statute, then, where a charterer, as the carrier under COGSA, loses the benefit of the COGSA fire exemption, does it follow that the vessel owner loses the benefit of the Fire Statute which expressly and unqualifiedly confers its protection upon all owners?

## STATUTES INVOLVED

Limitation of Shipowner's Liability Act (Fire Statute), 46 U.S.C. § 182:

> *No owner of any vessel shall be liable* to answer for or make good to any person any loss or damage, which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel, by reason or *by means of any fire* happening to or on board the vessel *unless such fire is caused by the design or neglect of such owner.* [Emphasis supplied.]

The Carriage of Goods by Sea Act, 46 U.S.C. §§ 1301(a), 1303 and 1304(1) and (2) and 1308:

> *§ 1301. Definitions*
>
> . . . .
>
> (a) The term 'carrier' includes the owner or the charterer who enters into a contract of carriage with a shipper.
>
> . . . .
>
> *§ 1303. Responsibilities and liabilities of carrier and ship*

*Seaworthiness*

(1) The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to—
(a) Make the ship seaworthy;
(b) Properly man, equip, and supply the ship;
(c) Make the holds, refrigerating and cooling chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage, and preservation.

*Cargo*

(2) The carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.

. . . .

§ *1304. Rights and immunities of carrier and ship*

(1) Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped, and supplied, and to make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried fit and safe for their reception, carriage, and preservation in accordance with the provisions of paragraph (1) of section 1303 of this title. Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other persons claiming exemption under this section.

*Uncontrollable causes of loss*

(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

. . . .



(b) *Fire, unless caused by the actual fault or privity of the carrier;* [Emphasis supplied.]

§ *1308. Rights and liabilities under other provisions* The provisions of this Chapter shall not affect the rights and obligations of the carrier under the provisions of sections 175, 181-183, and 183b-188 of this title . . . [the Limitation of Liability Act, including the section (46 U.S.C. § 182) now called the Fire Statute].

## STATEMENT OF THE CASE

This is an action for loss of cargo brought by cargo owners against the carrier of the cargo and the owners of the carrying vessel of which the carrier was the time charterer. The admiralty jurisdiction of the district court was invoked, and the case was tried before Judge William H. Orrick in the District Court for the Northern District of California. A month after the conclusion of trial, Judge Orrick delivered orally his findings of fact and conclusions of law (Appendix A), not following the frequent practice of leaving the findings to be sculpted by the prevailing party.[2] We commend to the Court the reading of the entire findings and conclusions, but for the purposes of this petition the facts may be set out in brief conclusory fashion based upon the findings.

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[2]Judge Orrick's careful and independent statement of findings and conclusions represented a practice to be highly commended for conformance with the views of this Court. *See United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 656-57 (1964). No findings were held to be "clearly erroneous," yet the Court of Appeals gratuitously disparaged Judge Orrick's findings as "elastic and equivocal" (Opinion, Appendix B, page 14B). It is impossible to tell why the Court of Appeals did this. Perhaps it did not understand the case. Perhaps it was perplexed on seeing thoughtful and balanced findings rather than the usual lopsided findings prepared by one of the parties. Perhaps the Court of Appeals thought that as Judge Orrick delivered his findings and conclusions orally, they

Petitioner Adelaide Shipping Lines, Ltd. owned the M/V GLADIOLA (Finding 2). Petitioner Salen Reefer Services AB was the time-charterer of the M/V GLADIOLA (Finding 3). Respondent Sunkist Growers, Inc. shipped a cargo of lemons on the GLADIOLA (Finding 5).

While the GLADIOLA lay in the harbor of Guayaquil, Ecuador, a fire broke out in her engine room (Finding 9). The fire was caused by the separation of a joint in a fuel oil line and was fed by oil from the line (Finding 11). After the outbreak of fire the chief engineer collapsed in the engine room and for a considerable time efforts were made to locate and rescue him (Findings 13 and 14). The GLADIOLA was a modern vessel equipped with a $CO_2$ fire smothering system for such fires, but the master refused to turn on the $CO_2$ system and flood the engine room with $CO_2$ as a means of putting out this fire for fear of killing the chief engineer if he were still alive. The master delayed use of the $CO_2$ system until he was convinced that the chief engineer was dead. Rescue attempts were then abandoned, and the $CO_2$ was discharged into the engine room (Findings 13 and 14). Because of the delay in the use of the $CO_2$ system, the fire became too intense to be controlled by $CO_2$ (Finding 16), with the result that it rendered the refrigeration system inoperable (Finding 17), and the cargo of lemons was lost (Finding 18).

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were not a carefully drafted judicial product, and missed the significance of the fact that the findings which Judge Orrick read into the record had been prepared during the month after conclusion of the trial. We are confident that upon reading the findings and conclusions the court will observe that they are thoughtful and well articulated and in accordance with the guidance provided in *Dalehite v. United States*, 346 U.S. 15, 24, 1953 A.M.C. 1175, 1182 (1953). In fact the findings and conclusions were the product of extensive personal research by Judge Orrick.



Judge Orrick made no express findings on the subject of lack of due diligence to make the vessel seaworthy, since such findings were legally unnecessary. He did make a specific factual finding that a different ferrule (SERTO) should have been used instead of the one which was used in the separated joint (Finding 32) and that in retrospect the crew should have been given certain instructions with respect to fire fighting (Finding 33). He also found, however, that at most these failures were failures of vessel officers or crew rather than high-level corporate employees (Findings 32, 33 and 34) and found therefore that the fire was not caused by "actual fault, privity, design or neglect" of petitioners (Finding 35).

In his Conclusion of Law No. 4 he stated:

> In a fire loss case under the Carriage of Goods by Sea Act, or the Fire Statute, the owner or charterer has the burden of proving that the loss resulted from the fire. The burden then switches to the shipper to show that the fire was the result of the design, neglect, fault, or privity of the owner or charterer . . . .

He then relied upon *Asbestos Corporation Ltd. v. Compagnie de Navigation*, 480 F.2d 669, 1973 A.M.C. 1683 (2d Cir. 1973), in stating that the owner and charterer do not have the burden of initially proving that they exercised due diligence to make the vessel seaworthy as a condition to obtaining the benefit of the Fire Statute and COGSA fire exception. Judge Orrick discussed and rejected Canadian authority reaching a contrary result under the Canadian law, which does not include an equivalent of the

Fire Statute (Conclusion 5). Judge Orrick therefore exonerated the owner and charterer.

The Court of Appeals reversed Judge Orrick, holding that a showing of due diligence under COGSA was required before the benefit of either the Fire Statute or the fire exception in COGSA could be invoked either by the owners or the charterers.

It is true that COGSA obligates a carrier generally to exercise due diligence (ordinary care) to make the vessel seaworthy (reasonably fit) prior to the commencement of the voyage. It is also true that in general terms this duty is non-delegable by a vessel owner and may be breached by any crew member or shoreside worker employed by an independent contractor, no matter how subordinate the worker. The Court of Appeals, however, has now made this non-delegable duty of COGSA a part of the Fire Statute, explaining that COGSA, as "the more recent legislation," controls. Opinion, Appendix B, p. 25B.

The Court of Appeals has held the shipowner and the charterer responsible for fire damage caused by the negligence of persons lower in authority than a managing agent. In so holding, the Court of Appeals:

(1) ignored the saving clause (46 U.S.C. § 1308) and treated COGSA as having amended the Fire Statute;

(2) adopted the authority in Canada, where there is no fire statute, as controlling under the United States Fire Statute;



(3) misread prior decisions of the Court of Appeals for the Second Circuit[3], the Fourth Circuit[4] and of its own[5] to conclude that there was no authority in the United States in conflict with its conclusion, contrary to the texts of the cases themselves and to the views of commentators[6] and in reliance upon an unfounded distinction unsupported by any authority[7];

(4) ignored and did not discuss the distinction between owners and charterers under the Fire Statute.

## REASONS FOR GRANTING THE WRIT

The writ of certiorari should be granted because the Court of Appeals has:

1. Decided a federal question in a way in conflict with an applicable decision of this Court; and

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[3]*Asbestos Corp. Ltd. v. Compagnie de Navigation*, 480 F.2d 669 (2d Cir. 1973); *Automobile Ins. Co. v. United Fruit Co.*, 224 F.2d 72, 1955 A.M.C. 1429 (2d Cir. 1955).

[4]*A/S J. LUDWIG MOWINCKELS REDERI v. Accinanto, Ltd.*, 199 F.2d 134, 1952 A.M.C. 1681 (4th Cir. 1952).

[5]*Albina Engine & Machine Works, Inc. v. Hershey Chocolate Corp.*, 295 F.2d 619, 1961 A.M.C. 2215 (9th Cir. 1961).

[6]Note, 5 J. Mar. L.&Com., 129, 133-34 (1973); Tetley, "Marine Cargo Claims", 114-15 (1965).

[7]The Court of Appeals in its opinion at Appendix B pp. 26B-29B treats this Court's decision in *Earle & Stoddart, Inc. v. Ellerman's Wilson Line, Ltd.*, 287 U.S. 420, 1933 A.M.C. 1 (1932), as well as the *Automobile Insurance Co.* case (note 2, *supra*) and the *Accinanto* case (note 3, *supra*) as inapplicable upon the basis that the lack of due diligence (negligence) in those cases involved stowage of cargo and the totally erroneous assertion that the stowage of cargo was not involved in seaworthiness within the meaning of COGSA. The condition of stowage, like condition of the vessel itself, is, of course, an element of seaworthiness. *Consumers Import Co. v. Kabushiki Kaisha Kawasaki Zosenjo*, 320 U.S. 249, 250, 1943 A.M.C. 1209, 1210 (1943). Thus the law is diametrically opposed to the Court of Appeals' view that, "In other words, the failure to properly stow the goods has nothing to do with the failure to make the ship seaworthy . . . ." (Opinion, Appendix B, p. 26B.)

2. Rendered a decision in this case in conflict with the decisions of two other Courts of Appeals, those of the Second and Fourth Circuits, on the same matter; or

3. Decided an important question of federal law which has not been, but should be, settled by this Court.

**The Decision Below Is in Conflict With An Applicable Decision of This Court..**

In *Earle and Stoddart, Inc. v. Ellerman's Wilson Line, Ltd.*, 287 U.S. 420, 1933 A.M.C. 1 (1932), this Court decided the relationship of the Fire Statute to the Harter Act, 46 U.S.C. §§ 190 *et seq.*, four years before COGSA was enacted. The Harter Act imposed upon owners the requirement of due diligence to make the vessel seaworthy. This requirement of the Harter Act was adopted by the Hague Rules, and thus by COGSA, and has the same meaning in all three. The Harter Act did not itself contain a fire exception paralleling the Fire Statute, as does COGSA,[8] but, like COGSA, it contained a section (46 U.S.C. § 196) expressly saving the Fire Statute. This Court held that the Fire Statute was not affected by the requirement of due diligence to make seaworthy (notwithstanding that the Harter Act itself did not contain a parallel fire exception). If the Harter Act, with its saving clause, did not repeal or

[8]The fire exception in COGSA has been held to have the same effect as the Fire Statute itself. *A/S LUDWIG MOWINCKELS REDERI v. Accinanto, Ltd.*, 199 F.2d 134, 143-44, 1952 A.M.C. 1681, 1695-96 (4th Cir. 1952); *see Automobile Ins. Co. v. United Fruit Co.*, 224 F.2d 72, 75, 1955 A.M.C. 1429, 1434 (2d Cir. 1955); *American Tobacco Co. v. The KATINGO HADJIPATERA*, 81 F. Supp. 438, 445, 1949 A.M.C. 49, 58 (S.D.N.Y. 1948), *modified*, 194 F.2d 449, 1951 A.M.C. 1933 (2d Cir. 1951); *see also* Gilmore & Black, The Law of Admiralty, 834 (2d Ed. 1975) ("The Carriage of Goods by Sea Act, in slightly different wording, confers substantially the same exoneration on the carrier").



modify the Fire Statute, then COGSA, with its equivalent saving clause, likewise did not do so and there is no color of reason to suppose that the decision in *Earle and Stoddart Inc. v. Ellerman's Wilson Line, Ltd.*, did not dispose of the question for COGSA as it did for the Harter Act. Other courts until now have thought that it did, as this Court will observe from the cases with which the court below has placed itself in conflict.

The Court of Appeals sought to distinguish the *Earle and Stoddart* decision in part on the basis that it had involved "stowage." We will discuss the erroneousness of that supposed distinction below, as it relates to the Court of Appeals' attempt to apply it to the decisions of other Courts of Appeals, on the basis of stowage of cargo. It is perhaps enough to point out here that the *Earle and Stoddart* case involved providing bunker fuel for the vessel's use, as to which the erroneous rationale of the Court of Appeals as to cargo stowage could have no application.

**The Decision Below Is in Conflict With Decisions of Other Courts of Appeals.**

In deciding that the immunity granted by the Fire Statute and by the fire exception of COGSA is subject to the condition of an exercise of due diligence to make the vessel seaworthy before and at the beginning of the voyage, the Court of Appeals here has placed itself squarely in opposition to decisions of the Courts of Appeals of the Second Circuit and the Fourth Circuit, in addition to ignoring *sub silencio* its own earlier contrary decision.[9]

[9]In *Hershey Chocolate Corp. v. The SS ROBERT LUCKENBACH*, 184 F. Supp. 134, 1960 A.M.C. 2143 (D. Ore. 1960), *aff'd sub nom. Albina Engine & Machine Works, Inc. v. Hershey Choc-*

Reading the opinion here in isolation, one might suppose that other courts had not decided the question to the contrary or, if they had, had done so obscurely. Neither impression would be true.

In probably its first fire case arising under COGSA[10] the Court of Appeals for the Second Circuit, in *Hoskyn & Co., Inc. v. Silver Line, Ltd.*, 143 F.2d 462, 1944 A.M.C. 895 (2nd Cir. 1944), exonerated the vessel owner from the consequences of a fire started at an auxiliary diesel engine which was admittedly unseaworthy before the commencement of the voyage, because cargo owners had failed to prove that the fire had been caused by a specific condition as to which the shipowners were personally neglectful. In

*olate Corp.*, 295 F.2d 619, 1961 A.M.C. 2215 (9th Cir. 1961), a repair contractor negligently started a fire in the hold of the vessel and cargo was destroyed. The piping of the ship's fire fighting system had been disconnected and, through the negligence of an employee, had not been reconnected to a shoreside source of water when the fire occurred. There is no question that this would have been a failure of due diligence under the non-delegable standards of COGSA. Judge Kilkenny, who wrote the opinion here and was then a district judge, exonerated the vessel, rejecting (184 F. Supp. at 139, 1960 A.M.C. at 1150) the notion that application of the Fire Statute was barred by unseaworthiness, relying upon *Earle and Stoddart, Inc. v. Ellerman's Wilson Line* (which he rejects here) and saying:

> The "neglect of the owner" mentioned in the statute means the owner's personal negligence, or in case of a corporate owner, negligence of its managing officers and agents as distinguished from that of the master or subordinates. [184 F. Supp. at 139, 1960 A.M.C. at 1149.]

The Court of Appeals affirmed in almost identical language (295 F.2d at 621, 1961 A.M.C. at 2218) and both courts cited as authority for the quoted proposition this Court's decision in *Consumers Import Co. v. Kabushiki Kaisha Kawasaki Zosenjo*, 320 U.S. 249, 1943 A.M.C. 1209 (1943).

[10]COGSA went into effect July 15, 1936, and the voyage commenced November 24, 1936, as shown by the district court opinion, *Hoskyn & Co., Inc. v. Silver Line, Ltd.*, 63 F. Supp. 452, 1943 A.M.C. 224 (S.D.N.Y. 1943).



doing so, the court stated the question, and dealt with it, entirely as one controlled by the terms of the Fire Statute as it had existed before the passage of COGSA and as it still exists. In other words, the question was one of design and neglect with respect to a specific cause of the fire, with no qualification of due diligence.

The same court decided in 1951 that both owner and charterer were entitled to exoneration for damage caused by fire to cargo carried under COGSA unless cargo proved actual design or neglect under the Fire Statute, without any qualification with respect to due diligence to make the vessel seaworthy. In *American Tobacco Co. v. The KATINGO HADJIPATERA*, 81 F. Supp. 438, 1949 A.M.C. 49 (S.D.N.Y. 1948), the district court had equated the Fire Statute and the COGSA fire exception and exonerated the owner but held the charterer under the Fire Statute for having negligently, and over the protest of the master, ordered the stowage of certain cargo alleged to have caused the fire. The Court of Appeals, in *American Tobacco Co. v. SS KATINGO HADJIPATERA*, 194 F.2d 449, 1951 A.M.C. 1933 (2d Cir. 1951), held that negligence had not been shown on the part of the charterer and so exonerated it also. Although the court referred to COGSA and adverted to the different burden of proof as to non-fire damage, it stated with respect to fire damage that "[n]o liability could be imposed unless the owners of those goods carried the burden of proving that the fire was caused by the shipowner's design or negligence or the carriers' actual fault or privity" (194 F.2d at 450, 1951 A.M.C. at 1934) (footnotes omitted), without any qualification respecting due diligence.

The following year the Court of Appeals for the Fourth Circuit, in *A/S LUDWIG MOWINCKELS REDERI v. Accinanto, Ltd.*, 199 F.2d 134, 1952 A.M.C. 1681 (4th Cir. 1952), *cert. denied*, 345 U.S. 992 (1953), squarely faced the same question and decided it directly contrary to the decision of the Court of Appeals in this case. The shippers there sued the charterer for cargo damage resulting from spontaneous combustion and explosion in a cargo of ammonium nitrate. The court assumed *arguendo* that the stowage was negligent but stated that negligent stowage by a competent stevedore would not constitute "actual fault or privity" on the part of the carrier. The court held that the COGSA fire defense and the Fire Statute have identical effect and gave full effect to both to exonerate the shipowner, notwithstanding that the negligent stowage assumed would have constituted a lack of due diligence to make the vessel seaworthy. In doing so, the Court of Appeals for the Fourth Circuit read this Court's decision in *Earle and Stoddart, Inc. v. Ellerman's Wilson Line, Ltd.*, as being "[d]irectly in point" and also relied on the Second Circuit cases, *Hoskyn & Co. v. Silver Line*, and *American Tobacco Co. v. KATINGO HADJIPATERA*.[11]

The question was then raised again in the Court of Appeals for the Second Circuit, in *Automobile Insurance Co. v. United Fruit Co.*, 224 F.2d 72, 1955 A.M.C. 1429 (2d Cir. 1955). Although the case ultimately turned upon the complete absence of fault, the court stated its understanding as to liability for fire as follows:

> The immunity from liability for fire loss under the Fire Statute is not conditioned upon compliance with

[11] 199 F.2d at 143, 1952 A.M.C. at 1695.



> other statutes, or with Coast Guard Regulations [citations, including *Earle & Stoddart v. Ellerman's Wilson Line*]. There are no exceptions other than those expressed in the statute itself, *viz.*, "unless such fire is caused by the design or neglect of such owner".
>
> . . . .
>
> We think that Congress intended as a condition for recovery for damage due to fire loss to place the burden on cargo interests of establishing that the fire was caused by the design or neglect of the owner. Since 1851 there has been no indication of congressional intent to relieve cargo interests of that burden. The exemption provided by the Carriage of Goods by Sea Act, enacted in 1936, 46 U.S.C.A. § 1304(2)(b), was the same as that provided by the Fire Statute, and the purpose of the exemption was the same [citation]. Congress thus extended the benefits of the Fire Statute to a "carrier" though not a shipowner, or an owner *pro hac vice*. No case has been called to our attention which would indicate a tendency on the part of the courts to relieve cargo interests of that burden. [224 F.2d at 75, 1955 A.M.C. at 1434.]

Three years later, in *Petition of Skibs A/S JOLUND*, 250 F.2d 777, 1958 A.M.C. 277 (2d Cir. 1957), the Court of Appeals remanded a case to the district court for additional findings on the possible fault of owners as a basis for determining whether the vessel was exempted from liability under the Fire Statute and COGSA. Once again the court indicated that the matter was governed by the Fire Statute and, in describing the findings necessary for determination, it emphasized the possible design or neglect of the owners but made no reference to any possible finding of due diligence to make seaworthy as a condition to

the operation of the Fire Statute and fire exception of COGSA.

Still more recently, the Court of Appeals for the Second Circuit, in *Asbestos Corp., Ltd. v. Compagnie de Navigation,* 480 F.2d 669, 1973 A.M.C. 1683 (2d Cir. 1973) has again revisited the question. The district court in its decision[12] stated and applied proper standards, citing familiar cases from this Court and the Courts of Appeals and found that the owners at a high management level had indeed been guilty of personal neglect under the Fire Statute and could not be exonerated. The Court of Appeals affirmed, again applying the familiar standard and stating flatly:

> Pursuant to these statutory provisions [the Fire Statute and COGSA], shipowners are exempt from liability for cargo damage caused by shipboard fire except when the fire is "caused by the design or neglect of such owner" (Fire Statute) or unless the fire is "caused by the actual fault or privity of the carrier" (COGSA). These two phrases have essentially the same meaning. [480 F.2d at 672, 1973 A.M.C. at 1686.]

The court concluded by endorsing the district court opinion as well-reasoned.

The Court of Appeals for the Ninth Circuit in the instant case attempts to evade conflict by torturing the *Asbestos Corp.* case into an apparent abandonment of the standard the Court of Appeals for the Second Circuit has always stated and followed, and stated again in *Asbestos*. To do this the court below rests its analysis upon selective omis-

[12] *Asbestos Corp., Ltd. v. Compagnie de Navigation Fraissinet et Cyprien Fabre,* 345 F. Supp. 814, 1972 A.M.C. 2581 (S.D.N.Y. 1972).



sion of relevant text and abandonment of context. The Court of Appeals' analysis of *Asbestos* will not stand up against conscientious reading of the opinions in the district court and the Court of Appeals in that case.[13]

The Court of Appeals below has attempted to sweep aside all of the cases in the United States involving stowage of cargo, including this Court's decision in *Earle and Stoddart, Inc. v. Ellerman's Wilson Line, Ltd.,* regarding bunker fuel oil for the vessel, on the basis of an erroneous analysis of COGSA from which the court concluded that negligent stowage of the cargo would not constitute a lack of due diligence to make seaworthy. (Opinion, Appendix B, p. 26B. The Court of Appeals' novel conclusion on this point was reached without the benefit of authority and is clearly wrong. Negligent stowage which causes a fire does render

[13] The district court had found that firefighting equipment was inadequate through owner's design or neglect and privity or knowledge. The Court of Appeals paraphrased this by saying the district judge had held the vessel "was unseaworthy because [owners] had failed to exercise due diligence in equipping the vessel" (480 F.2d at 671, 1973 A.M.C. at 1684). This can be taken as a true statement only by understanding due diligence to mean (as it does) the opposite of negligence and the reference to owners to refer to owners proper and not to subordinate employees or contractors.

The Court of Appeals unqualifiedly stated that owners were exempt absent actual fault or privity (480 F.2d at 672, 1973 A.M.C. at 1686). The only question then to be considered was whether the actual fault or privity must relate to the cause of the fire or might be read to relate more broadly to the cause of the damage. When the court went on, therefore, to talk of "an inexcusable condition of unseaworthiness" (480 F.2d at 672, 1973 A.M.C. at 1687) it should not be assumed to imply the opposite of its opening premise but to refer to that premise and to mean by inexcusable condition one which was caused by the owners' "actual fault or privity" or, in other words, his personal lack of due diligence.

Finally, the Court of Appeals, in affirming, unqualifiedly endorsed as "a well-reasoned opinion" (480 F.2d at 673, 1973 A.M.C. at 1688) the district court opinion which had discussed at greater length the standard for application of the Fire Statute and had cited and followed familiar cases treating it independently of due diligence.

the vessel unseaworthy at the commencement of a voyage, and this Court, in *Consumers Import Co. v. Kabushiki Kaisha Kawasaki Zosenjo,* has said so:

> The cause of the fire is found to be negligent stowage of the fish meal, which made the vessel unseaworthy. [320 U.S. at 250, 1943 A.M.C. at 1210.][14]

A fair reading of the relevant cases conclusively shows that the Court of Appeals opinion below is in serious conflict with the decisions of other circuits, and the conflict should be resolved by this Court.

**The Court of Appeals Has Decided an Important Question of Federal Law which Should Be Settled by this Court if, Contrary to our Belief, It Has Not Already Been Settled by Earle and Stoddart, Inc. v. Ellerman's Wilson Line, Ltd.**

Congress has pointedly stressed the Fire Statute's importance by expressly preserving its full benefits (or trying to, at least) against the demands of both the Harter Act and COGSA by placing saving clauses in both those acts.[15] Fire at sea is a peril of frequency as well as intensity. A casual reference to annotations found with the Fire Statute at 46 U.S.C.A. section 182, and the COGSA fire exception in 46 U.S.C.A. section 1304(2)(b), show many reported

[14]This Court was there affirming a decision in which the Court of Appeals, although upholding exoneration as to the fire damage, was required to address the subject of due diligence in connection with the general average claim, and held:

> If the stowage was such as made a fire likely . . . she was unseaworthy. . . . It follows that, if due diligence was not used in her stowage, due diligence was not used to make her seaworthy. [*Consumers Import Co. v. Kawasaki Kisen Kabushiki Kaisha,* 133 F.2d 781, 785-86, 1943 A.M.C. 277, 284 (2d Cir. 1943).]

[15]46 U.S.C. § 196; 46 U.S.C. § 1308.



opinions. This is the tip of the iceberg since, in the usual course, most cargo claims are settled, and of those tried, even most appellate cases, do not reach the reports. The Courts of Appeals for the Second, Fourth and Ninth Circuits are important maritime law circuits, covering many of the east and all of the west coast states. Many cargo interests, shipowners and chartering companies have contacts on both coasts, and the causes of action are as transitory as the ships upon which they are based. The obvious conflict between the Second and Fourth Circuits on the one hand, and the Ninth Circuit on the other hand, will make forum shopping determinative of litigants' causes. As matters now stand, cargo interests will file in Ninth Circuit courts every "fire" case where any jurisdictional claim can be laid within that circuit.

As the decision below, if followed, would virtually emasculate the Fire Statute and the COGSA fire exception and lead to new and vicious forum-shopping among the circuits, clearly the question involved is an important one which should be settled by this Court if, contrary to our position, it has not already been so settled by the Court in *Earle and Stoddart, Inc. v. Ellerman's Wilson Line, Ltd.*

## CONCLUSION

For the foregoing reasons, we respectfully submit that this Court should grant a writ of certiorari to review the decision of the Court of Appeals, to restore the harmony which, until now, has existed, based upon regular reliance in the Courts of Appeals and district courts upon each other's decisions and the decision of this Court with respect to the application of the Fire Statute.

Respectfully submitted,

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*Attorneys for Petitioner*

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*Of Counsel*

**(Appendices Follow)**

## Appendices

## APPENDICES

## APPENDIX A

United States District Court,
Northern District of California,
May 21, 1976.

No. C-75-1021-WHO.

Sunkist Growers, Inc.,
Plaintiff,

vs.

Adelaide Shipping Lines, Ltd.; Salen Reefer Services AB; Salen Shipping Agencies, Inc.; M/V Gladiola,
Defendants.

WILLIAM H. ORRICK, D.J. (orally):

*Findings of Fact.*

1. Plaintiff Sunkist Growers, Inc., which I will refer to as Sunkist, is a corporation duly organized and existing under the laws of the State of California.

2. The Claimant Adelaide Shipping Co., Ltd., which I will refer to as Adelaide, is a corporation duly organized and existing under the laws of Great Britain and is the owner of the *M/V Gladiola*.

3. Salen Reefer Services AB, which I will refer to as Salen, is a corporation duly organized and existing under the laws of Sweden and was at all relevant times the time charterer of the *Gladiola*.

4. The *Gladiola* is a general cargo vessel of 11,890 summer deadweight tons built in 1972 at Aalborg, Denmark. She is under British registry and her officers are British.

5. During the last week of August and the first week of September, 1974, at the Port of Long Beach, California, a cargo of 58,464 cartons of fresh lemons in good order and condition was loaded on board the *Gladiola* for refrigerated transportation to Gdansk, Poland. In accordance with the terms of the bills of lading numbers POL-1 and POL-2, issued by Salen, at all material times, plaintiff was the owner of said cargo.

6. Plaintiff Sunkist and defendant Salen conducted their shipping transactions pursuant to a three-year contract. Defendants provided vessels once or twice a week to transport the plaintiff's citrus cargoes. Occasionally plaintiff could not fill an entire vessel with the cargo. In those instances, and under the terms of the contract, Salen would arrange for additional cargo to be shipped, and would make stops en route to load this extra cargo. Employees of Sunkist and Salen were in daily contact by telephone and Telex.

7. When additional cargo was to be transported, plaintiff was always informed by Telex of the type of cargo that would be loaded, and the additional stops that would be made in order to pick up the extra cargo. As long as the additional cargo would not adversely effect the citrus fruits shipped by the plaintiff, and as long as the additional loading stops did not unduly delay the ship's arrival in Northern Europe, plaintiff did not object to deviations from a direct course to Northern Europe.



In this instance, plaintiff was informed by Telex that the vessel would be stopping in Ecuador to load bananas. Plaintiff did not object to this deviation.

8. The route from Long Beach to Northern Europe via Ecuador was a reasonable route within the contemplation of the parties, considering their long-term business relations and the contractual permission given to load other cargo.

9. The vessel departed Long Beach on September 2, 1974, for Ecuador, arriving at Guayaquil, Ecuador, on September 10, 1974. While the vessel was anchored at Guayaquil on September 10, 1974, at 5:50 p.m., a fire broke out in the engine room of the *Gladiola* which necessitated evacuation of the crew from the engine room.

10. The vessel's deviation to Guayaquil did not cause the fire. Indeed, the fact that the ship was anchored in Guayaquil Harbor at the time facilitated the control of the blaze, since the crews of other ships and the Guayaquil Fire Department were able to assist in putting out the fire.

11. The fire was caused when a fitting in the fuel pipe leading to generator Number 1 separated. Fuel sprayed onto the exhaust turbocharger and ignited. The second and third engineers were the first to arrive at the fire. They attempted to control the fire by switching the electrical load off generator Number 1 to the ship's three other generators, in order to shut off generator Number 1. They did not immediately turn off the fuel supply to the flaming generator. They also attempted to control the fire with a 50 kilogram hand fire extinguisher. In the course of these

efforts, the second engineer turned the valve on the extinguisher in the wrong direction, broke the valve, and rendered the extinguisher inoperative. Their efforts to control the fire were unsuccessful.

12. Within five minutes the fire was so intense it could not have been controlled by manual fire-fighting techniques. A black, acrid smoke, caused by the ignition of butyl insulation on the electrical cables, filled the engine room, making it very difficult to see or to remain there.

13. The ship was equipped with remotely-controlled $CO_2$ fire-fighting equipment that would have controlled the fire at this point. The controls for this $CO_2$ system are located outside of the engine room and were not affected by the fire during the first hour of the blaze. Once the $CO_2$ system is activated, it forces $CO_2$ into the engine room, causes the oxygen to rise, and smothers the fire.

The Master hesitated to activate the $CO_2$ system, because the Chief Engineer had collapsed in the engine room and could not be located. Flooding the room with $CO_2$ would have suffocated the Chief Engineer if he were alive.

14. Efforts to rescue the Chief Engineer were made until 7:05 p.m., at which time the vessel's Master determined that the Chief Engineer was dead, and rescue attempts were abandoned.

15. The Master reasonably delayed activation of the vessel's remotely-controlled $CO_2$ fire-extinguishing system while attempts to rescue the Chief Engineer were undertaken.



16. Due to the delay during the rescue efforts, the fire was too intense to be controlled by the $CO_2$ system. The fire had also spread to the control room and accommodation sections of the vessel. The only way to extinguish the engine room fire was to flood the room with sea water. This was done.

17. The fire and flooding completely destroyed the ship's generators. The ship's refrigeration system was, in turn, rendered inoperative. Without refrigeration, the lemon cargo would have spoiled.

18. Although the defendants tried to arrange for alternative refrigeration, none was available. The only reasonable course was to donate the lemons to the people of Ecuador. The loss of the lemon shipment resulted from the fire.

19. The fire was not caused by the design, neglect, fault, or privity of the defendants. The defendants took all reasonable precautions to provide a structurally sound ship; to maintain the ship in good working order; and to man the ship with a capable and competent crew.

20. The *Gladiola* was constructed, equipped, maintained, and operated under the supervision of Lloyd's Register of Shipping. The ship had been given Lloyd's 100 A-1 classification. This is the highest possible classification available from Lloyd's. The vessel owner, in good faith, submitted all the vessel's specifications to Lloyd's for review; made the modifications suggested by Lloyd's; and took every reasonable step available to an owner to insure that the vessel complied with Lloyd's highest standards.

21. The *Gladiola* was also constructed in compliance with standards established by the British Department of Trade and Industry and Safety of Life and Sea (SOLAS) Convention requirements, and in conformity with industry standards and the practice of prudent vessel owners.

22. Once having obtained a high Lloyd's classification, the defendants took reasonable precautions to maintain the ship in good working order. Lloyd's conducted annual reviews of the vessel's structure and operating performance. Shortly prior to the fire, generator Number 1 and its fuel line were rechecked and reapproved.

23. To insure adequate upkeep of the vessel, a detailed log was maintained of all repairs that were made, and all problems with the engine room equipment. Mr. Cockerell, a Superintendent Engineer and high level shoreside employee of the vessel owner, personally visited the ship four times a year, and personally inspected the ship's log.

24. If Mr. Cockerell determined that repairs were necessary to maintain the ship in good working order, he did not hesitate to hire extra crewmen to perform the needed work. For example, one month prior to the fire, Mr. Cockerell had hired extra fitting labor in Hong Kong to make repairs on generator Number 4.

25. Prior to the fire in generator Number 1, Mr. Cockerell was never informed of any maintenance problems with that generator, or with the fuel line leading to that generator. The ship's log did not reflect that any repairs were required or made on generator Number 1.



26. The defendants also took all reasonable precautions to insure that the ship was manned with an adequate and capable crew.

27. Although English law only requires that a vessel be staffed with one certificated engineer, the *Gladiola* crew included at least two engineers. Mr. Cummings, the Third Engineer, had gone through a practical apprenticeship training program of at least five years. He had also been examined, graded, and approved by the British Government. Before a crew member was hired, he was required to complete a detailed application on his prior experience, including his fire-fighting training. He was also required to attend a personal interview. Follow-up checks were made on the applicant's credentials and training.

28. To attract the best possible crew to the *Gladiola*, the defendants offered excellent and competitive work benefits, including pay at higher than union wage, family living quarters on board, two months' paid vacation after four months' ship duty, and modern engineer equipment to work with.

29. All of the ship's engineers had gone through some practical training in fire fighting. The certificated engineers had attended a four-day fire-fighting course, where they were instructed in fire-fighting theory, and also participated in practical drills which included instruction in the use of fire extinguishers. Mr. Cummings, the Third Engineer, had not gone through the certification process and the four-day course, but he had received a practical fire-fighting course from a prior employer.

30. The crew participated in fire drills aboard the *Gladiola* every two weeks. Each man was trained to report to a specific station on board. The purpose of these drills was to make sure the crew knew where the fire-fighting equipment was, and how to use it. Instructions for the proper use of the fire extinguishers were written on the extinguishers themselves.

31. In retrospect, the structure of the ship could have been safer in several aspects:

(1) The butyl lining on the electrical cables could have been sheathed in metal to reduce a blinding smoke in the event of fire;

(2) A flange joint, rather than a compression joint, could have been used on the fuel pipe leading into the generator, making a stronger connection;

(3) Fewer joints could have been designed in the pipe to reduce the possibility of leaks;

(4) Protective shields could have been placed around the generators to reduce the spray of hot fuel in the event of a leak;

(5) A SERTO ferrule could have been maintained in the particular fuel pipe joint that caused the leak, rather than the ERMERTO ferrule replacement that had been inserted;

(6) Barriers and fire dampers could have been placed along the electrical cabling to control the spread of fire throughout the ship;

(7) Suits of protective fire clothing could have been maintained on board.



32. Armed only with foresight, however, a prudent vessel owner and/or charterer would not necessarily have made most of these modifications. The modifications and additions that have been made with reasonable foresight would not have prevented the fire, or the destruction of the generator and the concomitant loss of refrigeration on board the *Gladiola*. Many British ships, classified by Lloyd's and SOLAS and the Department of Trade and Industry, use butyl linings on electrical cablings, and compression joints on low-pressure fuel lines such as the one that separated on the *Gladiola*. The multiple joint fuel pipe, used on board the *Gladiola*, is also in common usage, and the butyl insulation is widely accepted within the industry as safe. Although generator shields would reduce the amount of spray in the event of a leak, they could not have eliminated the spray altogether, and would not have prevented the fire in this instance. Although a SERTO ferrule should have been maintained in a particular joint, normal and reasonable external inspection, even by an experienced engineer, would not have revealed that an improper ferrule was in place. A failure to maintain the proper ferrule would be the fault of the crew in failing to report ferrule replacement, rather than the fault of the owner in failing to notice that a replacement had been made.

Although it would have been advisable for the safety of the rest of the ship to have fire barriers along the cabling, the spread of the fire did not cause the loss of the lemons, since the refrigeration system would have been destroyed if the fire had been contained in the engine room. Protective barriers would not have prevented the

destruction of the generators. Nor is it clear that the fire dampers would have prevented the spread of the fire once it was allowed to burn for the hour during the rescue search for the Chief Engineer.

Finally, while fire protection clothing would have been a wise addition to the ship's gear, the lack of such clothing on board the *Gladiola* did not cause the fire, did not cause the delay in locating the ship's engineer or in activating the $CO_2$ system, and did not cause the loss of the lemon cargo. The delay in locating the Chief Engineer was the result of the acrid, dense smoke, rather than the unbearable heat in the engine room.

33. In retrospect, it also appears that the crew should have been given specific instructions on the proper way to deal with engine room fires and the exact method of handling fire extinguishers. However, a reasonable owner and/or charterer, in preparing to deal with fires, would have relied on the certification of its crew members, along with their prior fire-fighting experience and training, ship drills, and excellent equipment labeled with instructions for use.

34. A reasonable owner and/or charterer would have relied on the ship's Master to tailor shipboard fire drills to a variety of fire situations, and to simulate fires, including engine room fires. Any failure to properly instruct the crew in the details of engine room fire-fighting techniques was the fault of the high level ship's crew, not the shoreside owner, charterer, or their high level employees.

35. The fire was not caused by the actual fault, privity, design, or neglect of the vessel owner or charterer.



*Conclusions of Law.*

1. This is a case of admiralty and maritime jurisdiction.

2. The owner of the vessel, Adelaide, is exonerated from liability by the U.S. Fire Statute, 46 United States Code, Section 182, and by the Carriage of Goods by Sea Act, 46 United States Code, Section 1304(2)(b).

3. The charterer, Salen, is exonerated from liability by the Carriage of Goods by Sea Act.

4. In a fire loss case under the Carriage of Goods by Sea Act, or the Fire Statute, the owner or charterer has the burden of proving that the loss resulted from the fire. The burden then switches to the shipper to show that the fire was the result of the design, neglect, fault, or privity of the owner or charterer. And I rely on the case of *Asbestos Co. Limited v. Compagnie de Navigation,* 1973 AMC at 1683, 480 F.2d 669 (2 Cir., 1973). In a fire case, the charterer and/or vessel owner do not have the burden of initially proving that they exercised due diligence in making the vessel seaworthy.

5. While this allocation of the burden of proof runs contra to the general scheme of proofs in shipping cases, since normally a shipper can recover merely by showing that he delivered the goods to the carrier in good condition and that the goods arrived damaged, American authority is clear that the fire exemption provisions shift the burden of proof to the shipper. The plaintiff's reliance on the Canadian authority of *Maxine Footwear Company v. Canadian Government Merchant Marine,* [1959] 2 Lloyd's Rep. 105, is misplaced. Although the Court in that case did place

the burden of proving initial seaworthiness on the carrier, that case was dealing with a Canadian statute fashioned on the Hague Rules.

Canadian commentator W. Tetley, in his treatise *Marine Cargo Claims,* acknowledges that Canadian and American allocations of proof differ in shipping fire cases, with the American authorities making it more difficult for the shipper to recover by imposing a heavy burden of proof.

6. The defendants Adelaide and Salen have sustained their burden of proof; the plaintiff Sunkist has not. Before liability is imposed, the negligence must be on the part of the owner/charterer, or their high-level shoreside employees. The owner or charterer are not liable for mere crew negligence. *Asbestos Corporation v. Compagnie de Navigation, supra.*

7. Mere reliance on compliance with Lloyd's or SOLAS certification criteria cannot insulate a vessel owner and/or charterer from liability. *Asbestos Corporation, supra.*

8. The test is whether a reasonable shipowner or charterer would have taken additional precautions to prevent or extinguish a fire.

9. This case is not controlled by the liability determinations made in *Asbestos Corporation, supra,* where liability was imposed (although the ship had complied with the SOLAS requirements) because a reasonable vessel owner would not have placed all the controls for fire-fighting equipment inside the engine room, the locale on board the ship where fires are most likely to occur, because in such a situation the fire-fighting equipment would most



likely be inaccessible or destroyed in the event of a fire. On the *Gladiola* the controls for the $CO_2$ fire-fighting equipment were located outside of the engine room. And it should be noted that the very $CO_2$ fire-fighting equipment that the Court in *Asbestos* suggested would have been appropriate was actually operative on the *Gladiola.*

10. Nor is this case analogous to the situation in *In re Liberty Shipping Corporation,* 509 F.2d 1249 (9 Cir., 1975), where liability was imposed upon a vessel owner who permitted a vessel to go to sea with a crew that did not know how to use the vessel's $CO_2$ system, and did not possess elemental knowledge of the properties or uses of $CO_2$.

On the *Gladiola* the crew knew how to use the ship's $CO_2$ system and did activate the system, once the efforts to rescue the Chief Engineer were terminated. The failure to control the fire was due to the crew's reasonable efforts to save the Chief Engineer, not to their incompetency.

11. Although the Carriage of Goods by Sea Act imposes liability on a vessel owner and/or charterer for losses resulting from unreasonable deviations from course and makes deviations for the purpose of loading or unloading cargo *prima facie* unreasonable, the deviation must be the proximate cause of the fire. GILMORE and BLACK, *The Law of Admiralty,* at 181; *Frederick Cone and Company v. Tai Shan,* 1955 AMC 420, 218 F.2d 822 (2 Cir., 1955).

12. The deviation to Ecuador was neither unreasonable in the light of the parties' past dealings and long-term shipping contract, nor was the deviation the proximate cause of the fire or the loss of the lemons.

13. Adelaide and Salen are entitled to judgment against Sunkist with costs to be assessed by the Clerk of this Court.

14. Defendants Adelaide and Salen shall lodge a form of judgment approved as to form by the plaintiff, on or before June 15, 1976.

## APPENDIX B

United States Court of Appeals
Ninth Circuit

No. 76-3112

Sunkist Growers, Inc.,
Plaintiff-Appellant,
vs.
Adelaide Shipping Lines, Ltd.,
Claimant-Appellee,
and
Salen Reefer Services AB, and
M/V Gladiola,
Defendants-Appellees.

[Filed Mar. 8, 1979]

Appeal from the United States District Court
Northern District of California

### OPINION

Before: DUNIWAY and KILKENNY, Circuit Judges, and McGOVERN, District Judge.*

KILKENNY, Circuit Judge:

This is an appeal in admiralty from a judgment dismissing appellant's complaint *in rem* and *in personam* against appellees for cargo damage aboard the vessel GLADIOLA.

*The Honorable Walter T. McGovern, United States District Judge for the Western District of Washington, sitting by designation.

## FACTS

The facts are not seriously in dispute. Appellant [Sunkist] is a California corporation engaged in packing and shipping citrus fruit. Claimant [Adelaide] is a corporation organized and existing under the laws of Great Britain and is the owner of the vessel GLADIOLA, a general cargo vessel of 11,890 tons carrying capacity. Salen is a corporation organized and existing under the laws of the country of Sweden and at all times relevant herein was the charterer of the GLADIOLA.

During the last week of August and the first week of September, 1974, at the Port of Long Beach, California, a cargo of 58,464 cartons of fresh lemons in good order and condition, owned by Sunkist, was loaded on board the GLADIOLA for refrigerated transportation to Gdansk, Poland. Sunkist and Salen conducted their shipping transactions pursuant to a three year contract. Salen provided the vessels once or twice a week to transport Sunkist's citrus cargoes. Occasionally, Sunkist would not fill the entire vessel with its cargo and in those instances, and under the terms of the contract, Salen could arrange for additional cargo to be shipped and would make stops enroute to load this extra cargo. Employees of Sunkist and Salen were in daily contact by telephone and telex. When additional cargo was to be transported, Sunkist was informed by telex of the type of cargo that would be loaded and the additional stops that would be made in order to pick up the extra cargo. As long as the additional loading stops did not unduly delay the ship's arrival in Northern Europe, nor adversely affect the citrus crop shipped by



Sunkist, it did not object to deviations from a direct course to Northern Europe. In this instance, Sunkist was informed by telex that the vessel would be stopping in Ecuador to load bananas. It did not object. The GLADIOLA departed Long Beach on September 2, 1974, for Ecuador, arriving and anchoring in Guayaquil Harbor on September 10th.

On that day, at approximately 5:50 P.M., a fire broke out in the engine room. This room was automated and normally in unmanned status, as it was at the outbreak of the fire. The cause of the fire was a separation of a Serto compression pipe fitting and an Ermerto ferrule in the low pressure diesel fuel line of the vessel's number 1 generator. The diesel fuel sprayed on to hot surfaces of the numbers 1 and 2 generators.

Cummings, an extra third engineer in charge of answering alarms from the unmanned engine room, upon hearing the fire alarm, picked up his ear muffs and went to the engine room where he proceeded to the generator flat. He observed a break in the fuel line and oil splashing onto the hot exhaust turbo chargers of the numbers 1 and 2 generators. At that time there were no flames. Then occurred what might well be described as a Shakespearean comedy of errors, with a result akin to one of his tragedies. Because he had no training in fighting engine room fire and no one had instructed him on what to do in such an emergency, Cummings failed to use the diesel oil turn off screw two or three feet below the joint, nor, for the same reason, did he turn off another valve some twenty to twenty-five feet from the generator on the main diesel oil supply line. This valve could have been closed by pulling a pin on a quick release mechanism. The second engineer

arrived at the scene about this time but, inasmuch as his fire fighting training was no better than Cummings', he also failed to close either valve. After reporting the fire to the control room, Cummings returned to stop the generator, but when he returned the flames prevented him from getting close enough to the valve. While the fire was still confined to the number 1 generator and the area immediately above it, the second engineer attempted to use the 50 kilogram fire extinguisher but turned the control valve on the extinguisher in the wrong direction and broke it, rendering the extinguisher completely inoperative. The valve on this fire extinguisher was activated by screwing the valve clockwise, rather than counterclockwise. Cummings wasn't even aware of the location of this "left-handed monkey wrench." While the second engineer was rendering the large fire extinguisher inoperable, Cummings went back to the control room and reported the generator on fire. It was not until then that he shut off the fuel to the pumps on the number 1 generator by means of a simple switch.

The fire spread rapidly to the oil in the bilges and along the inflammable butyl insulated electric cable, thus filling the engine room with dense smoke. Within minutes the vessel blacked out and the engine room had to be evacuated. It was then determined that the chief engineer was still on the refrigeration flat. While attempting to locate the chief engineer, Cummings stumbled over his body. He appeared to be dead. After attempts to save the engineer failed, the captain finally ordered the remotely controlled $CO_2$ fire extinguisher system in action, but the fire was out of control and could not be extinguished by the use of this



system. Three days later, on September 13, 1974, the fire was extinguished, but the damage was very extensive. The chief engineer died in the fire and the captain suffered a fatal heart attack a couple of days later.

Although the lemons had not been damaged in the fire, the destruction of the refrigeration equipment made it necessary to find local refrigerated storage, local markets, or transshipment of the lemons. All of these efforts failed and it became necessary to give the lemons to the military authorities for distribution to the people.* The value of the lost lemon crop was stipulated at $350,784.00.

## ISSUES ON APPEAL

From a decision of the district court holding that both appellees were protected from liability by the fire exemption statutes, appellant appeals and raises three issues:

I. Were appellees required to exercise due diligence to make the GLADIOLA seaworthy as a prerequisite to claiming a fire exemption under the Carriage of Goods by Sea Act of 1936, 46 U.S.C. §§ 1300, *et seq.*?

II. Was there a lack of due diligence on the part of appellees either in connection with the defects in the vessel which caused the fire and contributed to its spread or in failing to man the GLADIOLA with a crew properly trained in fighting fires in ships' engine rooms?

III. Did the GLADIOLA'S deviation to Guayaquil deprive the appellees of the fire exemption?

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*This may account for the unrest in Ecuador during the past few years.

DISTRICT COURT'S FINDINGS AND CONCLUSIONS

In its findings of fact, the district court found, among other things, that the GLADIOLA, prior to the commencement of the voyage, could have been made safe in the following respects:

> "(1) The butyl lining on the electrical cables could have been sheathed in metal to reduce a blinding smoke in the event of fire;
>
> (2) A flange joint, rather than a compression joint, could have been used on the fuel pipe leading into the generator, making a stronger connection;
>
> (3) Fewer joints could have been designed in the pipe to reduce the possibility of leaks;
>
> (4) Protective shields could have been placed around the generators to reduce the spray of hot fuel in the event of a leak;
>
> (5) A SERTO ferrule could have been maintained in the particular fuel pipe joint that caused the leak, rather than the ERMERTO ferrule replacement that had been inserted;
>
> (6) Barriers and fire dampers could have been placed along the electric cabling to control the spread of fire throughout the ship;
>
> (7) Suits of protective fire clothing could have been maintained on board." 1976 A.M.C. 2597, at 2602.

After making these findings, the court went on to say that a prudent vessel owner and/or charterer would *not necessarily have made most of these modifications,* including a statement that although a Serto ferrule should have been maintained in the particular joint, "A failure to maintain the proper ferrule would be the fault of the crew in failing to report ferrule replacement, rather than the fault of the



owner in failing to notice that a replacement had been made." Similar findings were made with reference to the other deficiencies mentioned by the court.

The court also found that the crew should have been given specific instructions on the proper way to deal with engine room fires and the exact method of handling fire extinguishers. Nonetheless, the court went on to say that a reasonable vessel owner and or charterer, in preparing to deal with fire, would have relied on the certification of its crew members, along with their prior fire-fighting experience and training, ship drills and equipment labelled with instructions for use.

Based on its findings of fact, the district court concluded, among other things:

> " • • • • • •
>
> 4. In a fire loss case under the Carriage of Goods by Sea Act, or the Fire Statute, *the owner or charterer has the burden of proving that the loss resulted from the fire. The burden then switches to the shipper to show that the fire was the result of the design, neglect, fault, or privity of the owner or charterer. And I rely on the case of Asbestos Co. Limited v. Compagnie de Navigation, 1973 AMC at 1683, 480 F.2d 669 (2 Cir., 1973). In a fire case, the charterer and/or vessel owner do not have the burden of initially proving that they exercised due diligence in making the vessel seaworthy.* [Emphasis supplied.]
>
> 5. While this allocation of the burden of proof runs contra to the general scheme of proofs in shipping cases, since normally a shipper can recover merely by showing that he delivered the goods to the carrier in good condition and that the goods arrived damaged, American authority is clear that the fire exemption

provisions shift the burden of proof to the shipper. The plaintiff's reliance on the Canadian authority of *Maxine Footwear Company v. Canadian Government Merchant Marine,* [1959] 2 Lloyd's Rep. 105, is misplaced. Although the Court in that case did place the burden of proving initial seaworthiness on the carrier, *that case was dealing with a Canadian statute fashioned on the Hague Rules.*" [Emphasis supplied.] 1976 A.M.C. at 2604. [Emphasis supplied.]

## THE STATUTES

The fire exemptions touching upon the problem before us are the 19th Century Fire Statute, 46 U.S.C. § 182 and the COGSA Fire Exemption, 46 U.S.C. § 1304 (2) (b).

The 19th Century Fire Statute provides:

"§ *182. Loss by fire*

No owner of any vessel shall be liable to answer for or make good to any person any loss or damage, which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, *unless such fire is caused by the design or neglect of such owner.*" [Emphasis supplied.]

COGSA, §§ 1301(a), 1303 and 1304 (1) and (2), provide in pertinent part:

§ *1301. Definitions*

* * * * *

(a) The term 'carrier' includes the owner or the charterer who enters into a contract of carriage with a shipper."

* * * * *



"§ *1303. Responsibilities and liabilities of carrier and ship*

*Seaworthiness*

(1) *The carrier* shall be bound, before and at the beginning of the voyage, *to exercise due diligence to*—

(a) *Make the ship seaworthy;*

(b) *Properly man, equip, and supply the ship;*

(c) Make the holds, refrigerating and cooling chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage, and preservation. [Emphasis supplied.]

*Cargo*

(2) The carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried."

* * * * *

"§ *1304. Rights and immunities of carrier and ship*

(1) Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness *unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped, and supplied,* and to make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried fit and safe for their reception, carriage, and preservation in accordance with the provisions of paragraph (1) of section 1303 of this title. *Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other persons claiming exemption under this section.* [Emphasis supplied.]

*Uncontrollable causes of loss*

(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

* * * * *

(b) *Fire, unless caused by the actual fault or privity of the carrier;*" [Emphasis supplied.]

* * * * *

## HISTORICAL BACKGROUND

In order to fully understand the nature of the complex legal problems presented, we must view them in their historical context, including the Common Law of Maritime Carriage of Goods at Sea, the Limitation of Liability Act of 1851 (46 U.S.C. §§ 181-189), the Harter Act of 1893 (46 U.S.C. §§ 190-96), The Hague Rules as formulated by the Brussels Convention of 1924 and the Carriage of Goods by Sea Act of 1936 (COGSA) (46 U.S.C. § 1300, *et seq.*)

The Act of 1851 was passed by the Congress to promote the expansion of the American Merchant Marine and to protect the capital investment of those engaged in maritime shipping. It is clear that the legislation was enacted for the purpose of placing American ship owning interests on a competitive basis with British interests insofar as limitation of liability was concerned. Gilmore & Black, The Law of Admiralty, Second Edition, § 10-1, *et seq.*, pp. 818-24. In addition to the Fire Statute Limitation (§ 182), the 1851 Act permitted the owner to limit his overall liability to the value of his interest in the vessel. (46 U.S.C. § 183).

Because the various sections of the 1851 Act were enacted together, the cases construing one section are frequently used to interpret another. In construing the 1851 legisla-



tion, the courts have held that while an owner may rely on the fire exemption therein mentioned, a time charterer such as the appellee Salen, is not an owner within the meaning of the Fire Statute and is precluded from relying on § 182 for exemption. *In Re Barracuda Tanker Corp.*, 409 F.2d 1013, 1015 (CA2 1969).

The subsequent history of maritime common carriage makes it obvious that the COGSA Fire Exemption of 1936, as distinguished from the 1851 Fire Statute, was part of an overall plan to settle the adverse interests of carriers and cargo shippers. This history is outlined in Gilmore & Black, The Law of Admiralty, Second Edition, §§ 3-22 to 3-24, pp. 139-144.

From that history, we gather that the British Courts generally upheld the validity of what was then commonly known as the "negligence" exceptions in bills of lading, while the federal courts in the United States held it against public policy for the carrier to contract itself out of liability for its own negligence. Consequently, when goods were carried under a bill of lading containing such a clause, the accessibility of courts or amenability to service of process made a crucial difference in the outcome of the litigation. In part as a result of this difference, the British Merchant Marine became dominant in the Atlantic. The United States, of course, was vitally interested in seagoing cargo, both export and import. Therefore, to partially solve this problem, the Congress in 1893 enacted the Harter Act, 46 U.S.C. §§ 190-96, which Act attempted to strike a balance between the interests of the carrier in being free from all claims based upon its negligence, and the shippers who

wished to hold the carriers responsible for the consequences of any sort of negligence. In effect, the Harter Act declared "negligence" exceptions in the bills of lading to be null and void, but carriers would not be liable for goods damaged due to the shippers acts or omissions or for errors of the crew, if the carrier did exercise due diligence to make the vessel seaworthy and to properly maintain, equip and supply the vessel.

While this compromise served to protect a cargo shipper's interest with respect to litigation in American courts, shippers in most of the other countries of the world were still at the mercy of the exoneration clauses in the bills of lading, or at least of the different judicial interpretations of the clauses which carriers continued to carefully insert in the bills. As an outgrowth of the conflicts between these two warring factions, the interested antagonists, which included banking and underwriting interests, met at the World's Shipping Conference of 1920 to put the Harter Act principle into effect generally. As an outgrowth of these meetings, the Brussels Convention of August 25, 1924, promulgated what are commonly known as The Hague Rules which, with important additions,[a] amounted to an international adaptation of the Harter Act. However, the United States did not ratify the Convention or enact COGSA, a statutory codification of The Hague Rules, until 1936.

It is well recognized that The Hague Rules or COGSA have superseded the Harter Act with respect to foreign

[a]See Appendix A.



trade and are *incorporated by reference in every bill of lading*[1] for foreign transport to and from the United States. It has been said that the primary purpose of COGSA is to protect carriers engaged in foreign trade to and from the United States against all-encompassing liability, while protecting the shipper's interest *by assuring that due care is exercised in making the ship seaworthy. Wirth, Ltd. v. S/S ACADIA FOREST,* 537 F.2d 1272, 1279 (CA5 1976). The intent of the Congress in passing COGSA is made absolutely clear by the language of Paragraph (8) of Section 3 of the original enactment, 49 Stat. 1209, 46 U.S.C. § 1303 (8).

> *"Limitation of liability for negligence*
>
> (8) Any clause, covenant, or agreement in a contract of carriage *relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section,* or lessening such liability otherwise than as provided in this chapter, shall be null and void and of no effect. . . ." [Emphasis supplied.]

This is the section which requires the carrier before and at the beginning of the voyage to exercise due diligence to (a) make the ship seaworthy; and (b) properly man, equip, and supply the ship.

[1]It is specifically incorporated into the two bills of lading covering this particular shipment (Exhibits 1030, 1031) under Part A, § II, which reads:

"Paramount Clause. The Hague Rules contained in the International Convention for unification of certain rules relating to bills of lading, dated Brussels the 25th of August, 1924, as enacted in the country of shipment shall apply to this contract . . ."

## DISCUSSION

As we read the record, along with the elastic and equivocal findings of fact of the district court, there is overwhelming evidence that the appellees were in violation of 46 U.S.C. §§ 1303 and 1304 of COGSA before and at the inception of the voyage in two respects:

(1) It is undisputed that the carrier failed to provide a proper Serto ferrule fitting in the low compression fuel joint that separated. It is also undisputed that the fitting had not been touched after the commencement of the voyage. This separation permitted the diesel oil to spray upon the hot generator parts, thus causing the fire. Moreover, the failure to use a flanged, rather than a compression joint in the fuel line is a clear violation of Lloyd's Rule, Chapter E, § 312.[2] The appellees' witness Seymour conceded that Rule E312 applied to the joint in question and that the joint was not flanged as required by the rule. There is no evidence that Lloyd's ever granted a variance of this rule. The fact that the district court said that compression joints on low pressure fuel lines were used on "many British ships" is of no importance. Mere compliance with a custom which falls below the United States' and Lloyd's standards is not sufficient. *See Texas & Pacific Railway Co. v. Behymer,* 199 U.S. 468, 470 (1903); *Waterman Steamship Corp. v. Gay Cotton,* 414 F.2d 724, 738-39 (CA9 1969). Even appellees' own witness, Mr. Young, would not testify that Serto joints as used on the GLADIOLA were common.

[2]"Transfer, suction and other low pressure oil pipes and all pipes passing through oil storage tanks are to be made of cast iron or steel, having flanged joints suitable for a working pressure of not less than 7 KG/CM² (100 lb./in.²). The flanges are to be machined and the jointing material is to be impervious to oil."



Appellees do not claim that the use of an Emerto brand ferrule in a Serto brand fitting was proper. The lack of symmetry in the joint was obvious to appellant's witness, Mr. Walsh, and was noticeable to even the owners' high managerial representative, Mr. Cockrell.

(2) Furthermore, we hold that there is overwhelming evidence that there was lack of due diligence on the part of the appellees in their failure to man the vessel with a crew properly trained in engine room fire fighting. The engineers' reactions to the fire, including both their failure to utilize the proper equipment available to shut off the flow of oil spewing from the defective joint and their inability to properly utilize the portable fire extinguisher, indicated a lack of fundamental preparation and knowledge of the various means available to efficiently control this type of fire.

A case closely in point and misread by the district court is *Asbestos Corp., Ltd. v. Compagnie de Navigation,* 480 F.2d 669 (CA2 1973). There the vessel THE MARQUETTE suffered an engine room fire. Unlike the case at bar, there was no fault on the part of the owner with respect to the *cause of the fire.* The claimed unseaworthiness involved the location of the fire f[illegible]ting equipment and its controls in the engine room. At trial, the owners contended that they could be liable only if their personal negligence caused the fire. The district court held for plaintiff. In speaking of the 1851 Fire Statute and the COGSA fire exemption, the appellate court said:

> "Appellants urge as to each a narrow reading of the exception to the exemption. Under their construction,

a fire ignited because of lack of due diligence by the shipowner would result in liability, but failure to maintain equipment adequate to extinguish a nonnegligently ignited fire before it causes the damage would not. Judge Levet rejected this construction. *He held that an inexcusable condition of unseaworthiness of a vessel,* which in fact *causes the damage—either by starting a fire or by preventing its extinguishment*—will exclude the shipowners from the exemption of the Fire Statute and COGSA. *We agree." Id.* at 672. [Emphasis supplied.]

The "*inexcusable* condition of unseaworthiness" mentioned in *Asbestos Corp.* no doubt refers to a condition of unseaworthiness where the carrier did not use due diligence. That is to say, *if the carrier used due diligence, the unseaworthiness would be excusable.*

True enough, the Second Circuit in speaking to both the Fire Statute and COGSA made the statement: "The burden of proof is on the carrier to show that he exercised due diligence. The fire exemption provisions merely *shift this burden of proof to the shipper. If the carrier shows that the damage was caused by fire, the shipper must prove that the carrier's negligence caused the damage." Id.* at 672-673. [Emphasis supplied.] The use of this language was entirely unnecessary to the decision for the reason that the court had already affirmed the trial court's conclusion that the Marquette was unseaworthy because of her owners' failure to exercise due diligence." *Id.* at 672. We quote the key language of the district court opinion:

> "Minimal foresight, however, dictates that the engine room is [a] highly volatile compartment of a ship and the possibility of fire breaking out is ever present.



> *A shipowner must anticipate and provide for the contingency that a fire may break out in the engine room disabling all fire fighting equipment located in the engine room.* The owners of the Marquette through their 'design or neglect' and 'privity or knowledge' were negligent in placing all fire fighting equipment inside the engine room and failing to provide an emergency pump or fire system located or controlled from outside the engine room. This negligence on the part of the shipowners displays a total disregard for minimal protection of cargo and rendered the Marquette unseaworthy. *Under the circumstances this court concludes that the defendants-shipowners are not exempt from liability under COGSA § 1304(2) (b) or the Fire Statute."* 345 F. Supp. 814 at 823. [Emphasis supplied.]

Our overlengthy analysis of the language in *Asbestos Corp.* is prompted by the casual treatment of the burden of proof by the author of the appellate court opinion. Although relying on COGSA, he completely overlooks the language of §§ 1303 (1) and 1304 (1) which places the burden of showing due diligence to provide a seaworthy ship squarely on the shoulders of the carrier. It is this burden that appellees must overcome in order to invoke the exemptions of either § 1304 (2) (b) or the Fire Statute.

In *Albina Engine & Machine Workers v. Hershey Chocolate Corp.*, 295 F.2d 619 (CA9 1961), we held that "neglect of the owner" under the Fire Statute refers to "the neglect of managing officers and agents as distinguished from that of the master or other members of the crew or subordinate employees." P. 621. In the case at bar, however, that distinction is immaterial. Here, the design or neglect was that

of managing officers or supervisory employees, not that of the master or crew or subordinate employees. The "design or neglect" being the failure to provide a proper compression or flange joint and to properly man and equip a trained crew prior to the commencement of the voyage.

Our own court in *New York Mdse. Co. v. Liberty Shipping Corp.*, 509 F.2d 1249 (CA9 1975), has placed *Asbestos Corp.* in proper prospectus. In *Liberty Shipping*, we held there was substantial evidence supporting the trial court's findings that the damage to the cargo resulted from the unseaworthiness of the vessel consisting of the incompetence of the master and the crew who were not properly trained in use of the vessel's fire fighting equipment. As in *Asbestos Corp.*, the cause of the fire which damaged the cargo was actually unknown. Here, we know that the cause of the fire was an improper ferrule. After reviewing the facts, Judge Merrill restated with approval what has been said many times, that fire is the peril most dreaded by mariners and one most difficult to combat in a fully laden ship. That being the fact, he agreed with the trial court that it was *incumbent upon the vessel's owners* to see that the master and the crew were fully trained in the operation and use of fire equipment.

In *Liberty Shipping*, the appellant contended that the district court's decision disregarded the owner's immunity from liability for damage to cargo caused by fire as granted by both the Fire Statute and by COGSA. The court in disposing of this contention quoted the same language cited *supra*, at page 13, from *Asbestos Corp.*, and followed the quotation with the language: "In turn, we agree." The appellant there made essentially the same arguments as



here made by the appellees. In response, the court said:

> "Appellant next contends that the district court has, contrary to the statutory exemptions, placed upon the owner strict liability for the loss suffered by cargo. Appellant reasons that the court, by attributing responsibility for cargo damage jointly to the fire and to unseaworthiness, has placed upon the owner the traditional nondelegable duty to make the ship seaworthy and thus has imposed strict liability. The statutory exemptions, it is contended, do not permit the imposition of liability by nondelegable duty. Appellant relies on *Earle & Stoddart, Inc. v. Ellerman's Wilson Line, Ltd.*, 287 U.S. 420 . . . (1932). . . ."
>
> • • • • •
>
> "However, the district court's holding here was entirely consistent with *Earle & Stoddart*. COGSA provides, 46 U.S.C. § 1303(1):
>
> 'The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to—
>
> (a) Make the ship seaworthy; . . .'
>
> In the case before us liability was not based on the traditional elements by which an owner is held liable for unseaworthiness of his vessel—those related to warranty and nondelegable duty. *Here there was owner neglect and actual fault constituting failure to exercise the due diligence required by COGSA through permitting the vessel to put to sea without having properly trained the master and crew in the use of fire-fighting equipment and without having remedied deficiencies in the vent closing devices. Where the unseaworthy conditions that were the cause of the fire damage existed by reason of owner neglect or actual fault, the exemptions created by the Fire Statute and COGSA do not apply.*" 509 F.2d at 1251-52. [Emphasis supplied.]

Of more than ordinary significance is the fact that the *Liberty Shipping* court did not place upon the shipper the burden of proof on the issue of due diligence. To the contrary, *Liberty Shipping,* by the use of the language: "Here there was owner neglect and actual fault constituting failure to exercise *the due diligence* required by COGSA . . . .", clearly was referring to the due diligence required by COGSA in 46 U.S.C. §§ 1303 (1) and 1304 (1). In § 1304 (1) the burden of proof is placed directly on the carrier by the following language: ". . . Whenever loss or damage has resulted from unseaworthiness, *the burden of proving the exercise of due diligence shall be on the carrier* or other persons claiming exemptions under this section." [Emphasis supplied.]

Appellees argue that the language "this section" ending the last sentence of paragraph 1, 46 U.S.C. § 1304 (1) limits the vitality of the "due diligence" provision to that paragraph and does not apply to paragraph (2), the Fire Exemption Clause of COGSA. This contention is groundless. Appellees fail to recognize that the entire contents of 46 U.S.C. § 1304 were encompassed in "Section 4" of the initial legislation, 49 Stat. 1210. That the Congress was aware of the distinction between "paragraph" and "section" is made crystal clear by the use of the language "in accordance with the provisions of paragraph (1) of Section 3 of this title." This language is used in the same paragraph as the word "section" in "Sec. 4" of COGSA, now § 1304. Obviously, both paragraphs must be read and construed together.

Two Canadian cases, *Maxine Footwear Co., Ltd. v. Canadian Government Merchant Marine, Ltd.* [1959] A.C. 589;



[1959] 2 Lloyd's List L.R. 105, [THE MAURIENNE]; and, *THE ANGLO-INDIAN,* [1944] A.M.C. 1407, are highly persuasive.

Involved in *THE MAURIENNE* is what we might term the Canadian COGSA. Like our own legislation, it was lifted almost word for word from The Hague Rules. The language of the Canadian COGSA with reference to the pertinent sections is almost identical with ours. Of no importance is the fact that the Canadian legislation used the word "Article," rather than the word "Section." Suggesting that the American Congress and the Canadian Parliament were working in unison is the fact that the Canadian Water Carriage of Goods Act was enacted in 1936, the same year that COGSA was enacted by the American Congress. The fact that the language "subject to the provisions of Article IV" appears at the beginning of Paragraph Two of Article III of the Canadian COGSA is of no importance here. The provisions of Article IV would be meaningless if they were not related to Article III. For comparison, we attach, as Appendix B, the equivalent Articles on the Canadian COGSA, corresponding to §§ 1303 and 1304 (1) and (2).

In *THE MAURIENNE* an employee, under instruction from the master, caused a fire by applying a blow torch to cork insulation around certain pipes. The fire spread and resulted in the ship being scuttled, causing substantial loss to the appellant's cargo. The British Privy Council,[3] in

[3]The British Privy Council is the court of last resort for cases emanating from some of the Commonwealth Countries. When *THE MAURIENNE* was decided, decisions of the Canadian Supreme Court could be taken to the Privy Council.

construing the Canadian COGSA legislation and in holding the carrier liable for the damage caused by the fire said, among other things:

> "This unseaworthiness caused the damage to and loss of appellants' goods. *The negligence of the respondents' servants which caused the fire was a failure to exercise due diligence.*
>
> "Logically the first submission on behalf of the respondents was that, in cases of fire, Art. III never comes into operation even though the fire makes the ship unseaworthy. All fires and all damage from fire on this argument fall to be dealt with under Art. IV, Rule 2(b).[4] If this were right, there was at any rate a very strong case for saying that there was no fault or privity of the carrier within that rule, and the respondents would succeed.
>
> "In their Lordships' opinion the point fails. *Art. III, Rule 1,*[5] *is an overriding obligation. If it is not fulfilled and the non-fulfillment causes the damage, the immunities of Art. IV cannot be relied on.* This is the natural construction apart from the opening words of Art. III, Rule 2. The fact that that Rule is made subject to the provisions of Art. IV and Rule 1 is not so conditioned makes the point clear beyond argument." [1959] A.C. 589 at 602-603. [Emphasis supplied.]

The above holding provides a ready answer to appellees' contention that the language "Subject to the provisions of Art. IV" distinguishes the Canadian COGSA from the American COGSA. The language is contained in § 2 of Article III of the Canadian COGSA and makes no reference whatsoever to § 1 of the same Article which requires the carrier to make the ship seaworthy and to properly man and supply the ship. Congress in enacting the American COGSA merely eliminated the "subject to . . ." language as surplusage.

[4] 46 U.S.C. § 1304 (2) (b).
[5] 46 U.S.C. § 1303 (1).



Another case interpreting the Canadian COGSA and holding that the Article IV (2) (b) (§ 1304 (2) (b)) fire exemption was conditioned upon the exercise of due diligence under Article III (1) (§ 1303 (1)) is *THE ANGLO-INDIAN,* [1944] A.M.C. 1407.

If not in conflict with our decisions, and they are not, we should follow the decisions of the Canadian authorities that have already interpreted The Hague Rules. *See Foscolo, Mango & Co., Ltd. v. Stag Line* [1932] A.C. 328; [1931] 41 Lloyd's List L.R. 165 (1931). It is there said "As these rules must come under the consideration of foreign courts, it is desirable in the interests of uniformity that their interpretation should not be rigidly controlled by domestic precedents of antecedent date, but rather that the language of the Rules should be construed on broad principles of general acceptation." *Id.* at 350; 174.

In speaking to the legislative history of COGSA, our Supreme Court in *Herd & Co., Inc. v. Krawill Machinery Corp.,* 359 U.S. 297 (1959), has said:

> "The legislative history of the Act shows that it was lifted almost bodily from The Hague Rules of 1921, as amended by The Brussels Convention of 1924, 51 Stat. 233. The effort of those Rules was to establish uniform ocean bills of lading to govern the rights and liabilities of carriers and shippers *inter se* in international trade." *Id.* at 301.

That the district court in our case misinterpreted the significance of the decision of the Canadian court in *THE MAURIENNE* is clearly demonstrated by its conclusion:

> "The plaintiff's reliance on the Canadian authority of *Maxine Footwear Company v. Canadian Government Merchant Marine,* [1959] 2 Lloyd's Rep. 105, is misplaced. Although the Court in that case did place the burden of proving initial seaworthiness on the carrier, that case was dealing with a Canadian statute fashioned on the Hague Rules."

Manifestly, the district court overlooked the fact that COGSA was also fashioned on The Hague Rules.

Having some bearing on our problem is *Waterman Steamship Corp. v. Gay Cottons,* 414 F.2d 724 (CA9 1969), a case in which the shipowner sought limitation of liability under the provisions of the Limitation of Liability Act, 46 U.S.C. § 183 (a). There, the court held that the captain's negligent failure to have the fathometer checked at the next port after the third mate told him it was inoperative did not support a denial of limitation of liability by the owner. It is noted that there was no showing that the fathometer was defective "before and at the beginning of the voyage." The following language of the court's opinion is relevant:

> "Under COGSA, 46 U.S.C. § 1304, the lack of *due diligence of any employee which occurs before or at the beginning of a voyage and results in unseaworthiness is sufficient to preclude complete exoneration of liability.*" *Id.* at 728. [Emphasis supplied.]

The court then went on to discuss the meaning of the language "privity or knowledge" within the meaning of



Limitation of Liability Act, 46 U.S.C. § 183 (a), and then said:

> *"We conclude that standards under the Limitation Act are different from those under COGSA.* The shipowner [under the Limitation Act] is entitled to limitation of liability if it can show that the lack of due diligence is not within its 'privity or knowledge.'" *Id.* at 731. [Emphasis supplied.]

Thus, by implication, it held that the same standard would not apply under COGSA. This is consistent with our holding that the due diligence required "before and at the beginning of the voyage" under COGSA § 1303 cannot be avoided by the "carrier" by either asserting lack of "privity or knowledge" or the exemptions of § 1304 (2). Clearly, an owner cannot close its eyes to what prudent inspection would disclose. *Waterman Steamship Corp. v. Gay Cottons, supra,* at 739.

Despite appellees argument to the contrary, we do not believe the provisions of Section 8 of the original COGSA, 46 U.S.C. § 1308, invalidates or in any manner affects COGSA'S requirements that the carrier shall be bound to *exercise due diligence* to make the ship seaworthy. Section 1308 provides that the provisions of the legislation shall not affect the rights and obligations of the carrier under the Fire Statute and other legislation. As we have already said, the Fire Statute must be read in the light of COGSA, the more recent legislation. In *New York York* [sic] *Mdse. Co. v. Liberty Shipping Corp.,* 509 F.2d 1249 at 1251-52, we held that an owner could not rely upon either fire exemption unless the owner had exercised the due diligence required by COGSA. To construe Section 8 in conformity

with appellant's contention would nullify the language of Sections 3 and 4, 46 U.S.C. §§ 1303 and 1304, dealing with due diligence and the burden of proof, and render meaningless the positive language these sections added to the prior legislation.

## APPELLEES' AUTHORITIES

The cases cited by the appellees involved either fires resulting from the carrier's failure to properly and carefully load, handle, stow, carry, care for and discharge the goods carried as required by Section 3, Paragraph 2, of COGSA, 46 U.S.C. § 1303 (2), or decisions made prior to the effective date of COGSA.

The decisions with reference to fire caused by negligent stowage are of no help on our facts. COGSA treats the responsibility for stowage separately and distinct from the responsibility of providing a seaworthy ship and to properly man, equip and supply the ship. A casual reading of Section 3 reveals this distinction. In other words, the failure to properly stow the goods has nothing to do with the failure to make the ship seaworthy or the failure to properly man, equip, and supply the ship. Section 4 (1) of COGSA, speaking to the burden of proof and the exercise of due diligence, specifically mentions Paragraph 1 of Section 3 with reference to unseaworthiness and to properly man and equip the ship but makes no reference whatsoever to the stowage provisions of Paragraph 2 of Section 3. Consequently, the "due diligence" and "burden of proof" provisions of Sections 3 and 4 of COGSA are not applicable to Paragraph 2, the stowage provisions of Section 3.



Typical of appellees' cases is *A/S J. Ludwig Mowinckels Rederi v. Accinanto, Ltd.*, 199 F.2d 134 (CA4 1952), which involved a fire and explosion resulting from spontaneous combustion in the cargo. True enough, the defendants sought to invoke the protections of the Fire Statute and the COGSA fire exemption. It is clear, however, that the court was primarily concerned with deciding whether the cargo had been stowed negligently by the stevedore. There was only a limited mention of the COGSA Fire Exemption, § 1304 (2) (b), the case being principally concerned with the stowage. In reading these cases, we must keep in mind that the Limitation of Liability Act (46 U.S.C. §§ 181-189) was there directly involved, while COGSA was not. Whatever the *Accinanto* court said with reference to the COGSA Fire Exemption would not control us here in that the provisions of Section 3 (1) and Section 4 (1) of COGSA were not in issue.

Another case cited by appellees which involved improper stowage of goods is *Automobile Ins. Co. v. United Fruit Co.*, 224 F.2d 72 (CA2 1955). But there the Second Circuit affirmed the district court's holding that plaintiffs had failed to show that the fire was caused by the cargo of bleaching powder much less by any improper stowage of that cargo. Again, Section 3 (1) and Section 4 (1) of COGSA were not properly before the court. Citing *Accinanto, supra,* the court continued the dictum that the purposes of the 19th Century Fire Statute and the COGSA Fire Exemption were the same. Neither case recognizes that the Limitation of Liability Act of which the Fire Statute was a part, was designed solely for the benefit of the shipowner. It is undisputed that the purpose of COGSA

was to upgrade the protection afforded the cargo owners and downgrade the protection afforded the interests of the shipowners and charterers.

Another case involving improper stowage which caused a fire cited by appellees is *American Tobacco Co. v. THE KATINGO HADJIPETERA,* 81 F. Supp. 438 (SD NY 1948), *modified* 194 F.2d 449 (CA2 1951). That case focused almost exclusively upon the Fire Statute with but passing reference to COGSA. *See* 81 F. Supp. at 446. In any event, the decision of the district court was nullified when the court of appeals held that the stowage of the cargo was not negligent.

Appellees cite *Earle & Stoddart, Inc. v. Ellerman's Wilson Line, Ltd.,* 287 U.S. 420 (1932), in support of their theory. However, the case was decided in 1932, some four years before the enactment of COGSA. Again, this was a stowage case. The owners sought exoneration under the 19th Century Fire Statute. There, the cargo owners relied upon several cases interpreting Section 3 of the Harter Act, 46 U.S.C. § 192, which contains a number of the exemptions now included in COGSA, Section 4 (2). Those cases held that the immunities in Section 3 of the Harter Act were granted only if *the carrier first established* that all of its employees exercised due diligence to make the vessel in all respects seaworthy. The Supreme Court affirmed the holding of those cases, but observed that Section 3 of the Harter Act did not contain an immunity for fire liability and, therefore, did not create any general duty of due diligence on the part of the shipowners which would condition immunity under the Fire Statute. 287 U.S. at 426-27. From our analysis it is clear that COGSA has made due



diligence under § 1303 (1) a prerequisite to claiming any exemption under § 1304 (2), and fire is included within these exemptions.

## DEVIATION

Our examination of the record convinces us that the trial judge's finding that the Guayaquil call was not an unreasonable deviation is not clearly erroneous. In light of our holding, we need not decide whether our pre-COGSA decision in the *HERMOSA*, 57 F.2d 20, 27 (CA9 1932), correctly allocates the burden of proof on the issue of whether a reasonable deviation contributed to a particular loss under 46 U.S.C. § 1304 (4).

## CONCLUSION

We adopt, as the law of our circuit, the construction placed on The Hague Rules by their Lordships in *THE MAURIENNE,* and hold that the provisions of Section 3, Paragraph 1, COGSA, create an overriding obligation and if that obligation is not fulfilled and the nonfulfillment causes the damage, the fire immunity of Section 4, Paragraph 2 (b), cannot be relied upon by appellees. This overriding obligation to exercise due diligence to: (a) make the ship seaworthy, and (b) properly man, equip, and supply the ship applies to the master and those in the management of the ship, as well as to the owners or charterers personally, or those who act for the owners in a managerial capacity. For non-application of the Fire Statute, *see Liberty Shipping, supra,* at 1251-52.

Our analysis of the record convinces us that the appelless also failed to carry their burden of proof on the issue

of exercising due diligence to make the ship seaworthy as required by Section 4, Paragraph 1, 46 U.S.C. § 1304 (1). Consequently, the district court's findings of fact rested upon an erroneous view of the law as expressed in its conclusions. It is practically conceded that the improper ferrule in place at the commencement of the voyage, permitted the volatile diesel oil to spray on the generators and thus was the proximate cause of the damage resulting from the fire. Moreover; as in *Asbestos Corp.*, it was not "crew negligence" that either started the fire or prevented its extinguishment, but a failure to properly train the crew in what to do in case of engine room fires and in the use of fire fighting equipment. This unperformed obligation required by Section 3 (1) (b) also was a cause of the damage. Therefore, the overall cause of the breakdown of the vessel's refrigeration equipment, which forced the appellant to donate the cargo of citrus fruit to the Ecuadorian government, was the failure of the appellees to fulfill their obligations as required by COGSA. It was not the fire. Accordingly, the findings, conclusions, and judgment of the district court are set aside and the cause remanded for further proceedings in conformity with our conclusions, including the entry of an appropriate judgment in favor of appellant.

IT IS SO ORDERED.



## APPENDIX A

For example: (1) the addition of fire to the exemptions of the Harter Act, Article 4, Par. 2, 51 Stat. 251 [46 U.S.C. § 1304 (2) (b)]; (2) the burden of proof on the exercise of due diligence by the carrier, Article 4, Par. 1, 51 Stat. 251 [46 U.S.C. § 1304 (1)]; and, (3) the due diligence required of the carrier "before and at the beginning of the voyage.", Article 3, Par. 1, 51 Stat. 249 [46 U.S.C. § 1303 (1)].

## APPENDIX B

The material portions of the Canadian Water Carriage of Goods Act provide:

"Article III.

RESPONSIBILITIES AND LIABILITIES—

1. The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to,

(a) make the ship seaworthy;

(b) properly man, equip, and supply the ship;

(c) make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.

2. Subject to the provisions of Article IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried.

"Article IV.

RIGHTS AND IMMUNITIES

1. Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped and supplied, and to make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation in accordance with the provisions of paragraph 1 of Article III.

"Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of



due diligence shall be on the carrier or other person claiming exemption under this section.

"2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from, . . .

"(b) fire, unless caused by the actual fault or privity of the carrier;"

## APPENDIX C

United States Court of Appeals
Ninth Circuit

No. 76-3112

Sunkist Growers, Inc.
Plaintiff-Appellant,

vs.

Adelaide Shipping Lines, Ltd.,
Claimant-Appellee,

and

Salen Reefer Services AB, and
M/V Gladiola,
Defendants-Appellees.

[Filed Apr. 19, 1979]

Appeal from the United States District Court
Northern District of California

### ORDER

Before: DUNIWAY and KILKENNY, Circuit Judges,
and McGOVERN, District Judge.*

Appellees' petition for rehearing is denied.

Upon remand, the district court may consider the issues raised by appellant's motion to add interest and to award attorney fees.

*The Honorable Walter T. McGovern, United States District Judge for the Western District of Washington, sitting by designation.

# In the Supreme Court of the United States

OCTOBER TERM, 1979

**No. 79-73**

ADELAIDE SHIPPING LINES, LTD.,
SALEN REEFER SERVICES AB, and M. V. GLADIOLA,
*Petitioners,*

vs.

SUNKIST GROWERS, INC.,
*Respondent.*

## Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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# In the Supreme Court of the United States

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## Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

### QUESTIONS PRESENTED

1. Is a determination whether "due diligence" is a prerequisite to exemption from fire liability academic when the fire was caused by "design or neglect" and "actual fault or privity" within the meaning of 46 U.S.C. §§ 182 and 1304(2)(b)?

2. If not, is the exercise of "due diligence" to make the vessel seaworthy at the inception of the voyage a prerequisite to the COGSA fire exemption, 46 U.S.C. § 1304 (2)(b)?

## STATEMENT OF THE CASE[1]

Petitioner Adelaide Shipping Co., Ltd. is the owner of the GLADIOLA (F.F. 2).[2] Petitioner Salen Reefer Services AB is the time charterer of the vessel (F.F. 3) and, as such, is precluded from relying on the Nineteenth Century Fire Statute, 46 U.S.C. § 182. *In Re Barracuda Tanker Corp.*, 409 F.2d 1013, 1015 (2d Cir. 1969). Therefore, even if the petitioners' contentions respecting the Nineteenth Century Fire Statute were to be accepted as true, there is no basis for reversing the Court of Appeals' decision insofar as the time charterer, Salen, is concerned.

As the Court of Appeals held, the material facts are uncontroverted and the evidence is overwhelming that the two corporate petitioners fail to qualify for either fire exemption because (as a result of the personal "design and neglect"[3] and lack of "due diligence" of their managing officers and supervisory employees) they created a condition of "inexcusable unseaworthiness." (Opinion pp. 2, 14-15, 17-18). This holding is based on the following:

First, "the crew should have been given specific instructions on the proper way to deal with engine room fires and the exact method of handling fire extinguishers." (F.F. 33). Petitioners had the duty to provide a vessel with a fully and

1. The facts are set forth in the opinion of the Ninth Circuit. Respondent will not burden the record by repeating them in detail.

2. The District Court's Finding of Fact (referred to herein as "F.F.") and Conclusion of Laws (referred to herein as "C.L.") are set forth in Appendix A to the Petition for a Writ of Certiorari. The opinion of the Ninth Circuit (referred to herein as "Opinion") is set forth in Appendix B to that Petition, and page references are to that appendix.

3. The phrase "design or neglect" used in the Nineteenth Century Fire Statute and the phrase "actual fault or privity" used in the COGSA fire exemption have the same meaning. *Asbestos Corp., Ltd. v. Compagnie de Navigation*, 480 F.2d 669, 672 (2d Cir. 1973).



properly trained crew. Petitioners' failure to fulfill that duty constituted personal "design and neglect" and "actual fault or privity." *New York Mdse. Co. v. Liberty Shipping Corp.*, 509 F.2d 1249, 1252 (9th Cir. 1975); *Cerro Sales Corp. v. Atlantic Marine Enterpises*, 403 F. Supp. 562, 567 (S.D. N.Y. 1975).

Second, it is undisputed that petitioners failed to equip the GLADIOLA with a flange joint as required by Lloyd's Rules, Chapter E, Section 312, under which this vessel was classified. (Opinion pp. 14-15; F.F. 31(2)). Moreover, the SERTO brand compression fitting used instead of the required flange joint contained an admittedly improper ERMERTO brand ferrule which inevitably caused the joint to separate, resulting in the fire. (F.F. 11, 31(5)).[4] This inexcusable condition was also the result of personal neglect and fault. *New York Mdse. Co. v. Liberty Shipping Corp.*, 509 F.2d 1249, 1252 (9th Cir. 1975); *Asbestos Corp. Ltd. v. Compagnie de Navigation*, 480 F.2d 669 (2d Cir. 1973).

The petition does ~~not contest these facts which *alone* fully~~ support the Court of Appeals' decision.[5] Both the COGSA fire exemption and the Nineteenth Century Fire Statute preclude exoneration when the fire loss is caused by such personal neglect or fault. Thus, even assuming the merit of all of petitioners' contentions concerning due diligence and the saving clause, 46 U.S.C. § 1308, respondent would still be entitled to a judgment in its favor. This Court should not grant review when a petitioner's quarrel with the decision below is purely semantic and when no change in the decision would result.

4. The District Court found that "a SERTO ferrule should have been maintained" in the joint. (F.F. 32).

5. Nor did petitioners challenge this holding in their Petition for Rehearing, discussed below in connection with the timeliness of this request for review.

## REASONS FOR DENYING THE WRIT

The writ of certiorari should be denied because:

1. Petitioners seek no more than a change in verbage which would not affect the result;

2. The Court of Appeals' decision is in accord with the history and purposes of the statutes involved, is mandated by the clear language of COGSA, is consistent with foreign authorities interpreting the Hague Rules (upon which COGSA is based), conforms with the decisions of this Court, and is not in conflict with any other decision in point;

3. There is no important question which need be settled by this Court; and

4. The petition is untimely.

## THE COURT OF APPEALS' DECISION IS NOT IN CONFLICT WITH THE HOLDINGS OF THIS OR ANY OTHER COURT

The decision below does not conflict with *Earle & Stoddart, Inc. v. Ellerman's Wilson Line, Ltd.*, 287 U.S. 420, 53 S. Ct. 200 (1932). That case, decided in 1932 prior to the enactment of COGSA, concerned only the Nineteenth Century Fire Statute. The fire resulted from spontaneous combustion caused by the negligence of the Chief Engineer in stowing a supply of new coal on top of old coal. Neither a lack of proper training of the crew nor a patent defect in the vessel constituting inexcusable unseaworthiness was in issue. The case holds merely that the Harter Act, which contains no fire exemption, had no effect on the Nineteenth Century Fire Statute. If Harter contained a COGSA-like fire exemption, the result would have been different.

In *Hoskyn & Co., Inc. v. Silver Line, Ltd.*, 143 F.2d 462 (2d Cir. 1944), neither the district court nor the Court of Appeals made even a passing reference to COGSA. The case dealt solely with the Nineteenth Century Fire Statute. Nor was it established that the fire resulted from the unseaworthy condition of the auxiliary diesel engine, as is implied by petitioners. While the vessel was found to be unseaworthy, it was not shown that this unseaworthiness had any causal relation to the fire.



*American Tobacco Co. v. The KATINGO HADJIPATERA*, 194 F.2d 449 (2d Cir. 1951); *A/S J. Ludwig Mowinckels Rederi v. Accinanto, Ltd.*, 199 F.2d 134 (4th Cir. 1952), *cert. denied*, 345 U.S. 992 (1953); and *Automobile Ins. Co. v. United Fruit Co.*, 224 F.2d 72 (2d Cir. 1955), are all cases involving allegedly improper stowage which caused fires. In all of these cases it was held that stowage was *not* negligent, so the issue here was not there decided. Also, it should be noted that the availability of the COGSA § 4 defenses is expressly conditioned only upon compliance with § 3(1), and not § 3(2) which specifically deals with stowage.[6]

In any event, the dicta in these cases is primarily directed to the Nineteenth Century Fire Statute, with no discussion of the effects of COGSA §§ 3(1) and 4(1).[7] Further, the dicta is colored by the fact that the Courts, *without discussion*, assumed the purposes and effect of the COGSA fire exemption and the Nineteenth Century Fire Statute are the same. 199 F.2d at 143, 144; 224 F.2d at 75. None recognized, as did the Ninth Circuit below, that "the purpose of COGSA was to upgrade the protection afforded the cargo owners

6. Improper stowage can result in unseaworthiness for some purposes. However, Congress may have felt that this type of unseaworthiness should not preclude the carrier from relying upon the § 4(2) defenses.

7. *Petition of Skibs A/S Jolund*, 250 F.2d 777 (2d Cir. 1957), is another irrelevant stowage case. This is but the first of a series of three opinions on two appeals in this case (*Verbeeck v. Black Diamond Steamship Corp.*, 269 F.2d 68 (2d Cir. 1959), *rehearing*, 273 F.2d 61 (2d Cir. 1959), the end result of which, as stated by several authorities, is quite uncertain. Gilmore and Black, *The Law of Admiralty* (2d Ed. 1975), § 10-24, p. 895 n.105s; Thede "Statutory Limitations, etc.", 45 Tulane L.R. 959, 986 (June 1971).

and downgrade the protection afforded the interests of the shipowners and charterers." (Opinion pp. 27-28). The dicta has no precedential value, stems from a lack of careful analysis of the disparate purposes of the Acts, and was properly distinguished by the Ninth Circuit. (Opinion pp. 27-28). Such dicta does not raise a conflict between circuits meriting this Court's attention.

The Ninth Circuit's decision is consistent with and supported by that of the district court and Second Circuit in *Asbestos Corp., Ltd. v. Compagnie de Navigation,* 345 F. Supp. 814 (S.D.N.Y. 1972), *aff'd,* 480 F.2d 669 (2d Cir. 1973).[8] There an engine room fire could not be extinguished because all of the fire fighting equipment was either located in or controlled from the engine room. Both courts began their discussion by stating as the initial issue, "whether the defendant [shipowners] exercised due diligence before and at the beginning of the voyage to make the ship seaworthy." 345 F.Supp. at 816.[9] The district court found that the vessel "was unseaworthy in that the defendant shipowners failed to exercise due diligence in equipping [the vessel] with adequate means for fighting an engine room fire," and held that the owners were not exempt from liability under the Nineteenth Century Fire Statute or the COGSA fire exemption. 345 F. Supp. at 823. The Second Circuit agreed:

8. Petitioners claim that the findings and conclusions of the District Court were the product of "extensive personal research" by the district judge (Petition for Writ of Certiorari, p. 6, n.2). Yet, *Asbestos Corp.* is the only case cited by the district judge as support for any of his conclusions regarding immunity from fire liability and, as recognized by the Ninth Circuit, he misread that case.

9. The Second Circuit restated the issue as "whether the [vessel] was unseaworthy," citing COGSA §§ 3(1) and 4(1), 480 F.2d at 670 & n.2. The district court also noted that it was the carrier's burden to exercise such due diligence under COGSA § 3(1). 345 F. Supp. at 820.



> "[The district court] held that an inexcusable condition of unseaworthiness of a vessel, which in fact causes the damage—either by starting a fire or by preventing its extinguishment—will exclude the shipowners from the exemption of the Fire Statute and COGSA. We agree." 480 F.2d at 672.

The "inexcusable condition of unseaworthiness" referred to resulted from conduct which constituted a lack of due diligence to make the vessel seaworthy. Indeed, in that case as in this one, the facts show not only a lack of due diligence but also personal "design or neglect" and "actual fault, or privity."

*Hershey Chocolate Corp. v. The S.S. ROBERT LUCKENBACH,* 184 F. Supp. 134 (D. Ore. 1960), *aff'd sub nom. Albina Engine & Machine Works, Inc. v. Hershey Chocolate Corp.,* 295 F.2d 619 (9th Cir. 1961),[10] is consistent with and demonstrates the wisdom of the Ninth Circuit's holding herein. In *Hershey Chocolate* the issue involved here was not raised since the vessel was seaworthy at the inception of the voyage and only became unseaworthy at the discharge port, due to the negligence of the owner's employees. Thus, the pre-conditions of the fire exemption statutes were satisfied.

The facts of *Hershey Chocolate* are precisely those under which an owner should be exonerated from fire liability. The owner and its employees had exercised due diligence before the voyage and provided a seaworthy vessel. Once the vessel had passed from the owner's control, the owner was not responsible for the negligence of employees contributing to the loss. See also *The LINSEED KING,* 285

10. The Court of Appeals hardly ignored *sub silentio* this earlier decision as charged by petitioners, considering that the Court cited it. (Opinion p. 17). The Court had little reason to discuss the case at length since it was not relied upon by petitioners in their Reply Brief below.

U.S. 502, 511-12, 52 S. Ct. 450, 452-53 (1932), which clearly makes this distinction in a limitation of liability case.

## THE COURT OF APPEALS' DECISION, IN THE SPIRIT OF UNIFORMITY OF INTERPRETATION OF THE HAGUE RULES, FOLLOWS FOREIGN AUTHORITIES ON POINT

Two other courts which have directly ruled on the due diligence requirements of COGSA as a prerequisite to the fire exemption are the British Privy Council, in *Maxine Footwear Co. v. Canadian Merchant Marine*, 1959 A.C. 589, [1959] Vol. 2 Lloyd's List L.R. 105 (1959), and the Supreme Court of Canada, in *The ANGLO INDIAN*, 1944 A.M.C. 1407, 1417, 1419. Both involved the Canadian COGSA, which like its American counterpart was taken almost bodily from the Hague Rules.[11] Both held that due diligence to make the vessel seaworthy is a pre-condition to reliance upon the COGSA fire exemption.

In following these authorities, the Court of Appeals adhered to this Court's admonition that the very purpose of the Brussels convention was to adopt a set of rules that could be uniformly enforced throughout the shipping world.

> "The legislative history of the Act shows that it was lifted almost bodily from the Hague Rules of 1921, as amended by the Brussels Convention of 1924, 51 Stat. 233. The effort of those rules was to establish uniform ocean bills of lading to govern the rights and liabilities of carriers and shippers *inter se* in international trade." *Herd & Co., Inc. v. Krawill Machinery Corp.*, 359 U.S. 297, 301, 79 S. Ct. 766, 769 (1959).

11. The trial court's treatment of *Maxine Footwear* demonstrates its lack of understanding of the history and language of the statutes involved. The Court said: "Although the Court in that case did place the burden of proving initial seaworthiness on the carrier, that case was dealing with a Canadian statute fashioned on the Hague Rules." (C.L. 5). The District Court overlooked the obvious and significant facts that both the American and the Canadian COGSA's are fashioned on the Hague Rules, and both are identical in every material respect with regard to the fire exemption.



Effecting this laudable purpose is no cause for review.

## THE CONSIDERATIONS PRESENTED BY AMICUS CURIAE DO NOT MERIT REVIEW

*Amicus curiae*, like petitioners, fails to address the fact that the Court of Appeals found the "design or neglect" and "fault or privity" required under their view.

> "Here, the design or neglect was that of managing officers or supervisory employees, not that of the master or crew or subordinate employees. The 'design or neglect' being the failure to provide a proper compression or flange joint and to properly man and equip a trained crew prior to commencement of the voyage." (Opinion pp. 17-18).

Acceptance of all of the contentions of *amicus curiae*, therefore, would not change the result.

This P & I underwriter's arguments, aimed at foisting upon the insurer of innocent cargo interests the loss caused by petitioners' personal fault and neglect are almost entirely outside of any record of these proceedings, and its forecast of doom (and higher grocery prices) if this is not done are pure speculation, resulting from poor analysis of the case law and the legislative history of the fire exemption statutes.

This Court need not intercede in this battle between cargo and P & I insurers. The Ninth Circuit has properly placed the loss on the underwriter who can do something to make ocean transportation safe for cargo and crew by bringing economic pressure, in the form of higher premiums, to bear

on owners and charterers who fail to provide properly manned and seaworthy vessels. Cargo underwriters are in no position to apply such pressure to the ocean carriers.

## IN ANY EVENT, THE PETITION IS UNTIMELY

Petitioners had 90 days from the date of judgment in which to file their petition. 28 U.S.C. § 2101(c). The decision of the Court of Appeals was filed on March 8, 1979. The petition was received by respondent, and presumably filed, on July 16, 1979, 130 days later.

Petitioners filed a Petition for Rehearing on April 3, 1979, which was denied on April 19, 1979. In order for a petition for rehearing to suspend the finality of the Court's judgment and to terminate the running of the time within which review must be sought, it must have the potential for setting aside or modifying the judgment. *Department of Banking, etc. v. Pink*, 317 U.S. 264, 266, 63 S. Ct. 233, 234 (1942); *Leishman v. Associated Wholesale Electric Co.*, 318 U.S. 203, 205-06, 63 S. Ct. 543, 544 (1943); *Federal Power Commission v. Idaho Power Co.*, 344 U.S. 17, 20, 73 S. Ct. 85, 86 (1952). Here the Petition for Rehearing did no more than attempt to clean up some of the language used by the Ninth Circuit in its opinion. Petitioners did not challenge the Court's basic holding that their fault and neglect had caused the fire and the loss, a holding which also goes unchallenged in this Court. Granting the rehearing upon the grounds asserted would not have resulted in vacation or modification of the judgment, so the running of the ninety day period was not terminated. At most the period was temporarily tolled during pendency of the Petition for Rehearing and continued running after denial. In either event, this Petition for a Writ of Certiorari was not timely filed.



## CONCLUSION

For the foregoing reasons, we respectfully submit that the Court of Appeals reached a just and proper result. It corrected manifest misconceptions of the law by the trial court and put into proper perspective the various legislative enactments governing the relationship between cargo and carrier. It has simply followed the intent of Congress clearly expressed in the fire exemption statutes. The decision is not in conflict with any decision of this or any other Court, and in fact, achieves a result consistent with the decisions of this Court, the lower federal courts and foreign courts. Petitioners seek only a modification of language, not of result, and review by this Court is not warranted. It is respectfully requested that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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# In the Supreme Court

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SUNKIST GROWERS, INC.,
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**On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## REPLY BRIEF OF PETITIONERS IN SUPPORT OF PETITION

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**On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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## REPLY BRIEF OF PETITIONERS IN SUPPORT OF PETITION

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### I

### IT IS A PERVASIVE FALLACY OF RESPONDENT'S BRIEF THAT THE "ACTUAL FAULT OR PRIVITY OF THE CARRIER" AND "DESIGN OR NEGLECT OF [THE] OWNER" HAVE BEEN FOUND IN THIS CASE WHEREAS THE TRUTH IS THAT THE DIRECT OPPOSITE HAS BEEN EXPLICITLY FOUND.

It is evidently the purpose of Respondent's Brief to mislead the Court as to the facts found below and thereby create the impression that no question of law is involved

and that the Court of Appeals' opinion was merely a lengthy theoretical speculation.

The facts upon which the petition here rests are indeed settled and uncontested. They are the facts found by the District Court below and left undisturbed by the Court of Appeals. Respondent blandly proclaims that "the material facts are uncontroverted," but goes on to make extraordinary assertions showing that what Respondent really contends is that the shipowner and charterer agree with the Respondent as to existence of actual fault or privity at high managerial levels which, if true, would establish liability under COGSA and constitute design or neglect of the owner under the Fire Statute. Can it be supposed that Respondent actually believes this, or that the Court of Appeals was mistaken on this point when it noted that the facts were "not seriously in dispute"?[1]

It is the function of the District Court to find the facts and the function of the Court of Appeals to treat questions of law on the basis of the facts so found unless those facts be explicitly overturned under proper standards of fact review. A finding of fact may be overturned only when it is determined to be clearly erroneous,[2] which means that "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."[3] The

[1]Opinion, Appendix 2-B.

[2]Fed. R. Civ. P. 52(a).

[3]United States v. Oregon Medical Society, 343 U.S. 326, 339 (1952).



standard is no different because this is an admiralty appeal.[4]

A finding as to privity is a finding of fact[5] and a finding as to "design or neglect" under the Fire Statute is the same thing.[6] The District Court explicitly found twice over that the fire was "not caused by the actual fault, privity, design, or neglect of the vessel owner or charterer" (Finding 35, App. 10-A; see also Finding 18, App. 5-A) and elaborated the point by making it clear that the faults which could be laid to the owner or charterer (and were later dealt with as such by the Court of Appeals) were faults of the crew rather than of the high level managerial employees whose involvement would import privity of the charterer or design or neglect of the owner. (Findings 32 and 34, App. 9-A and 10-A).

These findings of lack of actual fault or privity and design or neglect were not held to be clearly erroneous by the Court of Appeals. Nowhere did that court point to evidence which could have formed the basis of such a holding or assert a "definite and firm conviction" of mistake in regard to those findings. Indeed, had the Court of Appeals overturned the findings as clearly erroneous[7]

[4]McAllister v. United States, 348 U.S. 19, 1954 A.M.C. 1999 (1954).

[5]Waterman Steamship Corp. v. Gay Cottons, 414 F.2d 724, 738, 1969 A.M.C. 1682, 1701 (1969); Farrell Lines, Inc. v. Jones, 530 F.2d 7, 10, 1976 A.M.C. 1639, 1643-44 (1976).

[6]A/S J. Ludwig Mowinckels Rederi v. Accinanto, Ltd., 199 F.2d 134, 143, 1952 A.M.C. 1681, 1695 (4th Cir. 1952); Great Atlantic & Pac. Tea Co. v. Lloyd Brasileiro, 159 F.2d 661, 1947 A.M.C. 306 (1947).

[7]Neither Respondent's citations on Page 3 of its Brief nor reference to those same cases by the Court of Appeals below can serve to establish actual fault or privity or design and neglect with respect

there would have been no legal issue to discuss and all of the opinion would have been without point, since the petitioners, if in privity, would be clearly liable under the law as it has heretofore stood. Instead, the Court of Appeals, following a lengthy discussion, imposed upon the owner and charterer a requirement of due diligence to make the vessel seaworthy at and before the commencement of the voyage, for the only possible purpose of making their lack of privity irrelevant to a holding of liability against them.

It is astounding now to find the Respondent trying to make this Court believe that privity was found by the Court of Appeals, so as to lead this Court to believe that there is no issue of law presented by the Petition. Such disingenuous playfulness with the facts by the Respondent betrays a remarkable concern about coming to grips with the serious question of law presented.

## II

## RESPONDENT'S DISCUSSION OF THE CONFLICTING CASES IS MISLEADING.

Respondent's complaint that the *Hoskyn* case[8] made no reference to COGSA does not alter the fact that it arose under COGSA. The lack of reference to COGSA only tends to confirm our point, since no charterer was involved and, under the view which has obtained until the present case,

to the training of the crew or the use of an improper ferrule in this case. The cases cited are, in contrast to this case, simply instances in which the facts showed, and the trial court found, high managerial involvement and therefore privity and consequently "design and neglect".

[8]Hoskyn & Co., Inc. v. Silver Line, Ltd., 143 F.2d 462, 1944 A.M.C. 895 (2d Cir. 1944).



the Fire Statute applied in full vigor to owners, pursuant to section 8 of COGSA (46 U.S.C. § 1308), as we contend it still does and the Court of Appeals in this case denies.

Respondent dismisses the discussions in the *American Tobacco Company*,[9] *A/S J. Ludwig Mowinckels Rederi*,[10] and *Automobile Insurance Company*[11] cases as *dicta*. Of course, a determination that there was no fault at all does reduce discussion of privity to the technical status of *dictum*. But the positive and extended discussions of the question of privity under COGSA and design and neglect under the Fire Statute in these cases cannot be so lightly dismissed, when they have formed the doctrinal background for the determination of liability in other cases in their own and other courts. And it is certainly not at all correct to say that only *dictum* was involved in the *A/S J. Ludwig Mowinckels Rederi* case, where the court, for the purpose of its discussion, assumed the existence of faulty stowage on the part of the stevedore; the ruling there is at least an alternative holding. Nor is it so clear that *dictum* was involved in the *Automobile Insurance Company* case, since the court's discussion of the issue there involved its rejection of an attempt by cargo to resort, as here, to other statutory provisions to impair the effect of the Fire Statute.

[9]American Tobacco Co. v. The KATINGO HADJIPATERA, 81 F. Supp. 438, 1949 A.M.C. 49 (S.D.N.Y. 1948), *modified*, 194 F.2d 449, 1951 A.M.C. 1933 (2d Cir. 1951).

[10]A/S J. Ludwig Mowinckels Rederi v. Accinanto, Ltd., 199 F.2d 134, 1952 A.M.C. 1681 (4th Cir. 1952).

[11]Automobile Ins. Co. v. United Fruit Co., 224 F.2d 72, 1955 A.M.C. 1429 (2d Cir. 1955).

All three of the cases just discussed are also said by Respondent to involve *dicta* because they concern negligent stowage. This novel position is without rational foundation and untenable in light of *Consumers Import Co. v. Kabushiki Kaisha Kawasaki Zosenjo,* 320 U.S. 249, 250, 1943 A.M.C. 1209, 1210 (1943).[12]

Beyond what has already been said in the petition, it is sufficient, with respect to the *Asbesto Corp.* case,[13] upon which the Court of Appeals below and Respondent so heavily rely, to point to the Respondent's statement on page 7 of its Brief that in that case "the facts show not only a lack of due diligence but also personal 'design or neglect' and 'actual fault or privity.' " This clearly renders unnecessary, and therefore also *dictum,* any discussion of a a requirement of "due diligence" as a pre-condition, if indeed that is what the court were there discussing.

The *Hershey Chocolate Corp.* case[14] was not cited as a holding on the point here ~~but~~ because Judge Kilkenny, when he wrote that opinion, explicitly accepted the application to COGSA of this Court's decision in *Earle & Stoddart, Inc. v. Ellerman's Wilson Line, Ltd.,* 287 U.S. 420, 1933 A.M.C. 1 (1932) and other cases which he here rejects.

[12]Astute counsel for cargo in their footnote 6 reserve their position to assert improper stowage as unseaworthiness in the future as in the past.

[13]Asbestos Corp. Ltd. v. Compagnie de Navigation Fraissinet et Cyprien Fabre, 480 F.2d 669, 1973 A.M.C. 1683 (2d Cir. 1973).

[14]Hershey Chocolate Corp. v. The SS ROBERT LUCKENBACH, 184 F. Supp. 134, 1960 A.M.C. 1143 (D. Ore. 1960), *aff'd sub nom.* Albina Engine & Machine Works, Inc. v. Hershey Chocolate Corp., 295 F.2d 619, 1961 A.M.C. 2215 (9th Cir. 1961).



## III

## CONSIDERATIONS OF INTERNATIONAL UNIFORMITY ARE IRRELEVANT AND ILLUSORY.

Respondent asserts that the decision below should not be reviewed because international uniformity in giving effect to the Hague Rules is desirable and because the decision below is shown to be in conformity with Canadian law. It is a little much to say that conformity with Canada constitutes international uniformity. However that may be, the search here is for the meaning of two Acts of Congress, one of which, the Fire Statute, has no international counterpart and the other of which, COGSA, includes an explicit provision[15] requiring that the Fire Statute be given full effect, and thereby making COGSA non-uniform in fire cases. Indeed, the Hague Rules, by reserving all rights under various national statutes for limitation of liability,[16] accepted the disuniformity arising from the variety statutes.

## IV

## RESPONDENT'S ATTACK UPON THE TIMELINESS OF THE PETITION IS UNFOUNDED

The judgment of the Court of Appeals was entered March 8, 1979. By an Order dated March 16, 1979, under Fed. R. App. P. 40(a), the Court of Appeals extended the time from March 23 to April 3, 1979 for filing a petition for rehearing. The petition for rehearing was filed April 3, 1979 and was denied April 19, 1979. The petition here

[15]46 U.S.C. § 1308.

[16]International Convention for the Unification of Certain Rules Relating to Bills of Lading (Hague Rules, 1924), Article VIII, 6A Knauth, Benedict on Admirality, pp. 869-79 (7th rev. ed. 1969).

was filed July 16, 1979, eighty-eight days later, and was therefore timely.[17] As reference to the petition for rehearing will quickly show, the shipowner and charterer sought there, as they do here, to reverse the decision of the Court of Appeals imposing a precondition of due diligence to make seaworthy and therefore to reinstate the District Court's judgment exonerating them from liability. Respondent's characterization of the petition for rehearing is astonishing and its contention of untimeliness is frivolous.

## CONCLUSION

For the reasons stated in the petition and because of the lack of any cogent and candid argument against them, the petition should be granted.

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FREDERICK W. WENTKER, JR.,
*Attorneys for Petitioners*

LILLICK MCHOSE & CHARLES
R. LAWRENCE KURT
*of Counsel*

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[17]Bowman v. Loperena, 311 U.S. 262 (1940); *cf.* Leishman v. Associated Wholesale Electric Co., 318 U.S. 203 (1943).

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1979

**No. 79-73**

ADELAIDE SHIPPING LINES, LTD.
SALEN REEFER SERVICES AB, and M.V. GLADIOLA,

*Petitioners,*

—v.—

SUNKIST GROWERS, INC.,

*Respondent.*

## BRIEF OF ASSURANCEFORENINGEN SKULD AMICUS CURIAE IN SUPPORT OF PETITIONERS' WRIT OF CERTIORARI

M.E. DEORCHIS
*Attorney for Assuranceforeningen SKULD*
*Amicus Curiae*

HAIGHT, GARDNER, POOR & HAVENS
BRIAN D. STARER
*Of Counsel*

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## BRIEF OF ASSURANCEFORENINGEN SKULD AMICUS CURIAE IN SUPPORT OF PETITIONERS' WRIT OF CERTIORARI

By written consent of Petitioners and Respondent filed separately with this brief, Assuranceforeningen SKULD files this brief as *amicus curiae.*

### Interest of the Amicus Curiae

Assuranceforeningen SKULD is an association incorporated under the laws of the Kingdom of Norway with its central headquarters located in Oslo, Norway. The business of Assuranceforeningen SKULD is to provide to shipowners and charterers on a worldwide basis mutual insurance against liability and losses incurred by its Members in connection with an operation of vessels

entered. SKULD at the present time has entered 3,968 vessels with a total gross registered tonnage of 26,300,000 from 37 countries.[1] In addition, SKULD has approximately 5,800,000 gross registered tons of entries from 21 countries[2] relating to charterer's coverage.

Most of the tonnage described above is engaged in international commerce and in pursuit of that trade regularly call at ports in the United States to load and discharge cargo. SKULD and its Members will be directly affected by the decision of the United States Circuit Court of the Ninth Circuit as it relates to the application of the Limitation of Shipowner's Liability Act (Fire Statute), 46 U.S.C. §182, and the fire exemption found in the United States Carriage of Goods by Sea Act, 46 U.S.C. §1304(2)(b), as will marine underwriters and all carriers who transport cargo to and from the United States.

Therefore, Assuranceforeningen SKULD respectfully files this brief as *amicus curiae* in support of Petitioners' Writ pursuant to Rule 42 of the Revised Rules of this Court.

## ARGUMENT

Assuranceforeningen SKULD is in full accord and fully supports the statements made in Petitioners' brief. The

[1] The flags of registry include the following countries:
Argentina, Australia, Bahama, Bangladesh, Belgium, Bermuda, Brazil, Canada, Curacao, Cyprus, Denmark, England, Finland, France, Germany, Greece, Greenland, Holland, Honduras, Hong Kong, Iceland, India, Indonesia, Iran, Italy, Kuwait, Lesser Antilles, Liberia, Nigeria, Norway, Panama, Saudi Arabia, Singapore, Spain, Sweden, Switzerland, U.S.A.

[2] The nationalities of the charterers include:
Argentina, Australia, Belgium, Bermuda, Brazil, Canada, England, France, Germany, Gibraltar, Holland, Israel, Italy, Kuwait, Lichtenstein, Norway, Panama, South Africa, Switzerland, Taiwan, U.S.A.



subject of this case, as in all ship fire cases, relates not merely to cargo or property damage, but rather to the important function of who should bear the *loss* for fire damage. The question has far reaching economic impact on shipowners and carriers, as well as their respective underwriters. The Circuit Court in its decision has decided to ignore the intentions of Congress expressed more than 125 years ago in the Fire Statute, 46 U.S.C. §182, and later reaffirmed by the fire exemption in the U.S. Carriage of Goods by Sea Act, 46 U.S.C. §1304(2)(b). The Court abandons the purpose and objective of the Fire Statute and fire exemption and adopts for the Ninth Circuit a rule separate and apart from the rest of the land.

The Ninth Circuit opinion is in sharp conflict, as we will demonstrate, with the legislative purpose and intent expressed by Congress as well as the consistent judicial interpretation given both the Fire Statute and the fire exemption by U.S. Courts (the Ninth Circuit included) as long as the statutes have been law in this country.

The numerous shipowners and charterers, who are members of this worldwide mutual association, will suffer severe financial damage as a result of this decision if it is allowed to stand. It has caused great confusion and consternation in insurance circles and will lead to wasteful duplication of insurance by underwriting interests that represent both the carrier interests, as SKULD does, and the cargo underwriters, such as the Fireman's Fund Insurance Company (cargo underwriters of Respondent) that insure cargo shipped to and from the United States.

The issue presented here is not simple nor does it lend itself to easy explanation. However, one thing is and has always been abundantly clear (until this case) and that is when damage results to cargo from a shipboard fire, the shipowner or charterer will be held liable only if a

causative factor of the fire was *personal* to the owner or charterer. This exoneration does not depend on the exercise of "due diligence" by crew-members, stevedores or other low-level employees. This interpretation followed by our Courts since 1851 did not arise by chance or by judicial interpretation, but as the result of a *conscious scheme by the Congress of the United States to keep America in active competition with the world shipping community.* The scheme was not intended to give an advantage to carriers or a disadvantage to shippers, but simply to place the United States ocean commerce on the same insurance basis as its competitors.

This Court, speaking through Mr. Justice Jackson, in *Consumers Import Co., Inc. v. Kabushiki Kaisha Kawaski Zosenjo (The Venice Maru),* 320 U.S. 249, 254-256 (1943) concisely sets forth the Fire Statute's background and purpose:

> At common law the shipowner was liable as an insurer for fire damage to cargo. We may be sure that this legal policy of annexing an insurer's liability to the contract of carriage loaded the transportation rates of prudent carriers to compensate the risk. Long before Congress did so, England had separated the insurance liability from the carrier's duty. To enable our merchant marine to compete, Congress enacted this statute. It was a sharp departure from the concepts that had usually governed the common carrier relation, but it is not to be judged as if applied to land carriage, where shipments are relatively multitudinous and small and where it might well work injustice and hardship. The change on sea transport seems less drastic in economic effects than in terms of doctrine. It enabled the carrier to compete by offering a carriage rate that paid for carriage only, without loading it for fire liability. The shipper was free to carry his own fire risk, but if he did not care to do so it was well known that those who made a business of risk-taking would issue him a separate contract of fire insurance. *Congress had simply severed the insurance features from the carriage features of sea transport and left the shipper to buy each separately. While it does not often come to the surface of the record in admiralty proceedings, we are not unaware that in commercial practice the shipper who buys carriage from the shipowner usually buys fire protection from an insurance company, thus obtaining in two contracts what once might have been embodied in one. The purpose of the statute to relieve carriage rates of the insurance burden would be largely defeated if we were to adopt an interpretation which would enable cargo claimants and their subrogees to shift to the ship the risk of which Congress relieved the owner. This would restore the insurance burden at least in large part to the cost of carriage and hamper the competitive opportunity it was purposed to foster by putting our law on an equal basis with that of England.* (Footnotes omitted. Emphasis added.)



The decision in *The Venice Maru,* supra, expresses no more than this Court's understanding that Congress recognized that a vessel owner or charterer and cargo interests have a right to allocate the risk of fire damage contractually rather than having the risk shuffled back and forth on a case by case basis. While *The Venice Maru* deals with the Fire Statute, the identical purpose and policy underlies the fire exemption of the Carriage of

Goods by Sea Act. *A/S J. Ludwig Mowinckles Rederi v. Accinanto, Ltd.* 199 F.2d 134, 144 (4th Cir. 1952) *cert. denied* 345 U.S. 992 (1953).

What the statute does is to give the shipper a choice of buying his own coverage for fire risk (other than for a fire caused by carrier's personal fault) or not buying it, rather than having such high cost coverage forced upon him by its incorporation in the carrier's freight rate structure.

The purpose behind the Fire Statute and fire exemption is easily understood when it is reviewed in the framework of a standard ocean movement of cargo. The shipper prepares his cargo for shipping and in doing so customarily purchases an "open cargo policy" for either his account or for the consignee that protects the cargo against loss or damage. In such standard policy appears the "perils clause"[3] listing the perils or damages insured against. One of those perils insured against is fire. Therefore, if during the movement of the cargo from shipper to ultimate consignee damage by fire occurs, the cargo interest, be it the shipper or consignee, "will be made whole." See W. Winter, *Marine Insurance* 174-75 (3d ed. 1952). This cargo insurance underwriter covers all fire damage and knows that the risk of fires not caused by the ocean carrier's personal fault is his risk and will not be recoverable in a subrogation case. He thus structures his premium accordingly.

[3] "Touching the adventures and perils which the said . . . . Insurance Company is contented to bear, and takes upon itself in this voyage, they are of the seas, men-of-war, *fires*, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, reprisals, takings at sea, arrests, restraints and detainments of all kings, princes, or people, of what nation, condition or quality soever, barratry of the master and mariners, and all other perils, losses and misfortunes that have or shall come to the hurt, detriment or damage of the said goods and merchandises, or any part thereof." (Emphasis added).



This insurance coverage is what Mr. Justice Jackson referred to in *The Venice Maru*, supra, as a second contract of carriage between the shipper and ocean carrier.

On the other side of the ocean movement, we have the ocean carrier, be it a vessel owner or charterer, who offers to carry the cargo pursuant to a contract of carriage from port of loading to port of discharge. However, if during this period damage from fire results, the owner or charterer will not be responsible for the fire damage *unless* the fire was caused by the "design or neglect" of the shipowner or with the "actual fault or privity" of the COGSA charterer. As previously noted, this modifying language has resulted uniformly in underwriters, such as Assuranceforeningen SKULD, excluding from coverage fire unless the cause is determined to be as a result of the owner's "design or neglect" or the charterer-carrier's "actual fault or privity." In other words, the P and I insurance of shipowners and charterers is limited by the "laws modifying the liability of the shipowner," as well as the terms of the bills of lading. W. Winter, *Marine Insurance* 307 (3d ed. 1952).

P and I insurance—Protection and Indemnity—is a special concept which was formed and implemented to protect members against legal liability, *e.g.* liability imposed by law applicable to the contract of carriage. Thus, the coverage is not wide-open, but is based on a member's possible liability for damage to or loss of cargo taking into account the applicable statute and case law.

In the case of damage by fire, Assuranceforeningen SKULD as well as practically every other P and I Club[4]

[4] The United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Limited
(Managers: Thos. R. Miller & Son (Bermuda))

in the world bases its standard coverage for U.S. claims on the same requirements as set forth above, namely, fire coverage based on "design or neglect" and/or "actual fault of privity."

The extent of coverage must now be understood in the framework of the premium system which in P and I insurance is based on mutuality. The premium system is non-profit in that the "advance call" or premium is set at the beginning of each year based on certain criteria such as the type of vessel (dry cargo liner, tanker, tramp, etc.), the geographical trade of the vessel, and the type of trade the members are in (liner service, tramp, etc.).

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The West of England Ship Owners Mutual Protection & Indemnity Association (Luxembourg)
(Managers: The West of England Ship Owners Mutual Insurance Association (London) Limited)
The Standard Steamship Owners' Protection and Indemnity Association (Bermuda) Limited
(Managers: Charles Taylor & Co. (Bermuda))
The London Steam-Ship Owners' Mutual Insurance Association Limited, London
(Managers: A. Bilbrough & Co. Ltd., London)
The Britannia Steam Ship Insurance Association Limited, London
(Managers: Tindall, Riley & Co., London)
The Newcastle Protection & Indemnity Association, Newcastle
(Managers: Martin Fryer and P. M. Fryer)
The Steamship Mutual Underwriting Association Limited, London
(Managers: Alfred Stocken & Co. Ltd., London)
The North of England Protecting & Indemnity Association Ltd., Newcastle
(Managers: W. Ferguson, Newcastle)
The Sunderland Steamship Protecting & Indemnity Association, Sunderland
(Secretaries: John Rutherford & Son)
The Liverpool and London Steamship Protection & Indemnity Association Ltd., Liverpool)

In addition:

The Japan Ship Owners Mutual P & I Association, Kobe
and
The International Tanker Indemnity Association Ltd., London
Oceanus Mutual Underwriting Association (Bermuda) Ltd.
(Managers: John Laing (Management) Ltd., London)



However, it *does not* take into account that one of the entered vessels will be going into one area of the United States where the Fire Statute and fire exemption are given different meanings from everyplace else in the United States. The result in the present decision, if allowed to stand, would not only require changes in P and I coverage for shipowners and charterers throughout the world doing business with the West Coast of the United States, but more importantly shifts the allocation of risk from the cargo underwriter to the P and I Clubs such as Assuranceforeningen SKULD. This is strictly against the allocation of risk system enacted by Congress in 1851 which has been followed *uniformly* in the United States since that time until this case.

P and I underwriters would have to increase their rates on vessels doing business with the West Coast, which would result in higher freight charges on cargo moving to and from the West Coast. Eventually the cost would be reflected on the grocery shelf because it does not necessarily follow that cargo underwriters will be prepared to reduce their premiums.

The impact of the Ninth Circuit decision in *The Gladiola* will be immediate and harmful in that it now allows cargo underwriters, who charge a full-risk premium for fire coverage, to proceed via subrogation against a vessel owner or charterer without regard to the heretofore requirement that the carrier risk be limited to that narrow area where damage is due to fires caused by the actual fault or privity of the carrier or his personal design and neglect. This acknowledged stiff burden of proof was set up based upon express Congressional intent to let the fire risk rest with the cargo interest, except in the specified narrow area of fires caused by the carrier's per-

sonal involvement. The result will be harmful in two ways in that it will allow the cargo underwriter to reap an unfair "windfall" from the switch in the allocation of risk back to the owner-charterer, and it will cause a dramatic increase in the calls or premium due the P and I Clubs as a result of the increases in losses. Since ship fires usually cause heavy losses, these increased premiums must necessarily result in the dramatic increases in the freight rates which will only add the profits of the cargo underwriters. Needless to say, this accomplishes exactly the *opposite* result intended by Congress. See *The Venice Maru,* supra, at pages 255-256.

As outlined above, the concern of Assuranceforeningen SKULD is that the decision by the Ninth Circuit will drastically upset the world shipping market by throwing protection and indemnity associations into a cycle that will raise the calls or premiums, which in turn must be reflected in increases in shipping freight rates on vessels calling at West Coast ports, which in turn must have an effect on the movement of commerce to one section of the United States. Furthermore, this shift in the "allocation of risks" may lead to economic waste, as P and I insurance coverage for fire risk to a particular shipment may cost more than fire coverage under a cargo policy. The reason for this is that the cargo owner knows the value of his cargo and will cover only that value. The carrier can only guess at the values of cargo he will carry and will tend to over-insure in the excess insurance markets. The costs of such insurance are "forced" upon the shipper through increased freight rates. Cargo insurance spreads the cost of covering fire risk on any voyage among many cargo interests in direct relation to the nature of their risks, based upon known values, whereas



the cost of P and I insurance is spread over freight rates on an average basis, with the accumulated burden of loss falling on one policy based on the estimate of maximum exposure.[5]

### The Circuit Court's Misinterpretation of the Law

The error introduced by the Circuit Court in *The Gladiola* decision is its requirement that "due diligence" be proven as an "overriding obligation" before an owner or charterer may avail itself of the exoneration. However, nowhere in the language of the Fire Statute, 46 U.S.C. § 182, will one find any reference to this overriding obligation or prerequisite to exercise "due diligence" in order to claim the protection of the Statute.

Furthermore, when the Harter Act was enacted in 1893, the Fire Statute was preserved *in toto* without any requirement by the carrier, either shipowner or charterer, to prove the exercise of due diligence by its employees. 46 U.S.C. § 196.

Finally, in 1936, Congress enacted the U.S. Carriage of Goods by Sea Act (COGSA) which was modelled on the Hague Rules of 1924. COGSA, as the legislative history shows, was enacted to supersede the Harter Act in respect to foreign commerce.[6]

It is interesting to note that during the hearings on S. 1152 (COGSA) before the Committee on Merchant Marine

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[5] See C. McDowell, Containerization: Comments on Insurance and Liability, 3 J. Mar. & Comm. 503-507 (1972).

[6] S. Rep. No. 783, 74th Cong. 1st Sess. 5 (1935):

> "The bill, when enacted, will, in respect of foreign commerce by sea supersede the present act of February 13, 1893, popularly known as the 'Harter Act' from the time the goods are loaded on, to the time when they are discharged from the ship."

and Fisheries of the House of Representatives in 1936, it was thought that since the Fire Statute, 46 U.S.C. § 182, applicable to shipowners, had been preserved *in toto* by the Harter Act, the wording of the fire exemption of COGSA contained in Section 4(2)(b), applicable to all carriers, might cause "confusion and uncertainty" in that the fire exemption did not contain the same wording as the Fire Statute. The Committee report notes:

> "Section 4(2)(b) of the bill notwithstanding the saving provisions of section 8, is thought to be in conflict with the fire statute (U.S.C. title 46, sec. 182) because of the use of the words *unless caused by the actual fault or privity of the carrier* in the bill, whereas, in the fire statute the qualifying words are, *unless * * * caused by the design or neglect of such owner.* This phrase in the bill is taken from the British Act, and has been given an interpretation by the British courts different from that given by the Supreme Court to the corresponding phrase in our fire statute. Enactment of 4(2)(b) undoubtedly would cause confusion and uncertainty; and since the bill itself in section 8 disclaims all intent to modify the fire statute, and there is no apparent reason why it should be modified, it is thought section 4(2) (b) should be changed to read:
>
> '4(2)(b): Fire, unless caused by the design or neglect of the carrier.' "[7]

It is submitted that the main reason why the language of the COGSA fire exemption was not changed was because "actual fault of privity" was the language used in

[7] Hearings on S. 1152 Before the Committee on Merchant Marine and Fisheries, House of Representatives, 74th Cong., 2d Sess. 13 (1936).



the international convention in drafting the Hague Rules of 1924. A driving force behind the drafting and adopting of the Hague Rules was a worldwide movement for standardization of maritime laws. As was expressed in the petition for certiorari in *The Venice Maru,* supra,

> "The Hague Rules, which are incorporated in both the American and British Carriage of Goods Acts, contain an exception against liability for loss to fire. The language of these Rules is identical in England and in the United States, and if they are to receive a different interpretation in two countries, many years of painstaking work by commercial men to arrive at uniformity in the law of carriers will have gone for naught."[8]

Needless to say, the Court allowed the petition and later reversed a rather novel construction of the Fire Statute decided by the lower court, thus restoring harmony between the two jurisdictions.[9]

In regard to novel construction of the Fire Statute, the Circuit Court in this case has misconstrued not only the COGSA fire exemption but also the Fire Statute by reading into the unambiguous language of the statutes a requirement that a shipowner prove the exercise of due diligence by his employees as well as himself prior to being able to take advantage of either the Fire Statute or fire exemption. This reasoning is based on a misapprehension of what the COGSA legislation superseded.

Again, referring to the legislative history of COGSA as it was being discussed in committee, the specific purpose

[8] A. Knauth, *The American Law of Ocean Bills of Lading,* 137 (4th ed. 1953).

[9] Consumers Import Co., Inc. v. Kabushiki Kaisha Kawasaki Zosenjo, 320 U.S. 249 (1943).

of the enactment of COGSA was to keep the United States in competition with the rest of the world's shipping nations. COGSA was no more than the United States' enactment of the Hague Rules of 1924. However, since the United States already had existing legislation dealing with ocean transportation, namely, the Harter Act and the Fire Statute, Congress wanted it understood what changes would result in enacting the new legislation.

When it came to dealing with the changes between the Harter Act and COGSA, the Hearings Before the Committee on Merchant Marine and Fisheries, House of Representatives show a clear understanding of the differences:

> 3. *Specific exemptions from liability.* Section 4(2)(a) to (p) grant a carrier exemptions from certain enumerated causes. It is these provisions, and these alone, under the bill which grant the shipowner substantially his only advantage from the legislation. Of the exemptions, 11 are contained in the Harter Act, (passed in 1893), but with this modification:
>
> *Under the Harter Act, in order to enjoy the benefits of the exemptions, the shipowner is under the burden of establishing that he has exercised due diligence to make the vessel in all respects seaworthy and properly manned, equipped and supplied. If he sustains that burden, then he will be entitled to exemption from liability for losses resulting from the causes enumerated in paragraphs (a), (c), (d), (f), (g), (m) and (n).*
>
> *Thus the burden as to which the shipowner is relieved is that of showing that he exercised due diligence to make his vessel seaworthy.* However, the shipowner will not be relieved in the above respect if his failure to use due diligence to make the vessel seaworthy, or negligence in the care and custody of the cargo, contribute to the loss.
>
> *The principal gain to the carrier under the bill, therefore, would be exemption from loss or damage from the enumerated causes, such as negligence in navigation, without being required to show, as a condition precedent,* that due diligence was exercised to make the vessel seaworthy, unless unseaworthiness contributed to the loss. If it does so contribute, then the carrier will not receive any advantage not enjoyed under existing law and right of contract.[10] (Emphasis added)



The point that must be recognized, which was completely overlooked by the Ninth Circuit, is that the due diligence requirement that was "up front" in the Harter Act and was still a part of the COGSA but simply under an altered burden of proof scheme, was *never* a part of the fire defense under either the Fire Statute which was preserved by the Harter Act[11] or under the COGSA "saving clause."[12]

The quotation cited above from the Committee Hearings shows that Congress' purpose in changing the due diligence requirement did not affect either the application of the Fire Statute, Harter Act or COGSA as none were concerned with "due diligence" when the fire defense was asserted. This can be readily seen from the absence of "(b)", 46 U.S.C. § 1304(2)(b), from the quotation above entitled "Specific exemptions from liability."

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[10] Hearings on S. 1152 Before the Committee on Merchant Marine and Fisheries, House of Representatives, 74th Cong., 2d Sess. 63 (1936).

[11] 46 U.S.C. §196.

[12] 46 U.S.C. §1308.

The Circuit Court, in final analysis, confused the general failure to exercise due diligence by any of the owner's employees, which casts liability in the usual unseaworthiness case, with the actual fault or privity of the carrier relating to an unseaworthy condition which results in fire damage. It is the latter which is required to cast liability on the carrier under 1304(2)(b) and the burden of proving the carrier's personal failure to exercise due diligence, i.e. his "actual fault or privity," is on the shipper. The burden is the same as to all defenses listed from 1304(2)(a) to 1304(2)(p). The distinction is found in Section 1304(2)(q),[13] where the burden is placed on the carrier and is expressed in the same terms as 1304(1).

The state of the law on burden of proof is (and has always been until this decision) as follows:

The carrier makes out a *prima facie* defense under the Fire Statute or the fire exemption of COGSA by proving the damage complained of was caused by fire. The burden then shifts to the cargo interest to prove that the loss was caused by the "design or neglect" of the shipowner or the "actual fault or privity" of the owner or charterer, as the case may be. Both phrases amount to the same thing. In some instances, the carrier's personal failure to exercise due diligence to make the vessel seaworthy may constitute the "neglect" or the "fault" and such proof by cargo interests will cast liability of the cause for the fire damage. The fire exemption of § 1304(2) (b) however, limits liability for unseaworthiness or for any other cause of the fire, to those causes brought about by the "actual fault or privity" of the carrier. The Fire Statute does, and should, operate on the same burden of proof.

[13] 46 U.S.C. §1304(2)(q).



## Conclusion

One of the most dreaded fears of the sea is fire aboard ship. Fires have consumed innumerable vessels and their cargo over the centuries and will in all likelihood continue to do so, hopefully on a reduced scale, but needless to say the risk of loss is large and will continue. Since at least 1851 in this country, the risk of fire loss to cargo has been allocated by statute to be primarily the burden of the cargo interests, unless the vessel owner or charterer personally knew or should have known of the condition that caused or contributed to the fire. This scheme has resulted in a complicated yet practical approach to compensating the concerned parties for these losses and for apportioning marine fire risk among their respective underwriters. The Ninth Circuit decision in this case raises questions of the utmost importance to the world-wide marine underwriting community, as well as to shippers and carriers alike, and therefore, deserves plenary consideration by this honorable Court with briefs on the merits and oral arguments.

Respectfully submitted,

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No. 79-73

# In the Supreme Court of the United States

OCTOBER TERM, 1979

ADELAIDE SHIPPING LINES, LTD., ET AL., PETITIONERS

*v.*

SUNKIST GROWERS, INC.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE**


WADE H. MCCREE, JR.
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## BRIEF OF THE UNITED STATES AS AMICUS CURIAE

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This brief is filed in response to the Court's invitation of October 9, 1979.

### QUESTION PRESENTED

Whether, in admiralty cases involving loss by fire, the unseaworthiness of a vessel can preclude the owner from invoking the immunities from liability for fire established by the Limitation of Shipowner's Liability Act, 46 U.S.C. 182, and the Carriage of Goods by Sea Act, 46 U.S.C. 1304(2)(b).

### STATUTES INVOLVED

The Limitation of Shipowner's Liability Act, 46 U.S.C. 181 *et seq.*, provides in pertinent part:

§ 182. *Loss by Fire*

No owner of any vessel shall be liable to answer for or make good to any person any loss or damage,

which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner.

The Carriage of Goods by Sea Act, 46 U.S.C. 1300 *et seq.*, provides in pertinent part:

§ 1301. *Definitions*

* * * * *

(a) The term "carrier" includes the owner or the charterer who enters into a contract of carriage with a shipper.

* * * * *

§ 1303. *Responsibilities and liabilities of carrier and ship*

(1) *Seaworthiness*

The carrier should be bound, before and at the beginning of the voyage, to exercise due diligence to—

(a) Make the ship seaworthy;

(b) Properly man, equip, and supply the ship;

(c) Make the holds, refrigerating and cooling chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage, and preservation.

(2) *Cargo*

The carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.

* * * * *



§ 1304. *Rights and immunities of carrier and ship*

(1) *Unseaworthiness*

Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped, and supplied, and to make the holds, refrigerating and cooling chambers, and all other parts of the ship in which goods are carried fit and safe for their receiption, carriage, and preservation in accordance with the provisions of paragraph (1) of section 1303 of this title. Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other persons claiming exemption under this section.

(2) *Uncontrollable causes of loss*

Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

* * * * *

(b) Fire, unless caused by the actual fault or privity of the carrier;

* * * * *

§ 1308. *Rights and liabilities under other provisions*

The provision of this chapter shall not affect the rights and obligations of the carrier under the provision of * * * section 175, 181 to 183, and 183b to 188 of this title * * * [the Limitation of Shipowner's Liability Act, including 46 U.S.C. 182].

## STATEMENT

This suit in admiralty arises from damage by fire to a cargo of lemons owned by respondent Sunkist that was shipped aboard the vessel GLADIOLA for delivery to Gdansk, Poland. The vessel received the lemons in Long Beach, California, and then proceeded to Guyaquil Harbor, Ecuador, with respondent's consent, to load additional cargo. While the GLADIOLA was in Guyaquil Harbor, a fire broke out in the engine room that ultimately rendered the refrigeration system on the vessel inoperative, thus making it impossible to preserve the cargo for delivery to the European buyer. The lemons were accordingly donated to the government of Ecuador, resulting in a loss to respondent of $350,784 (Pet. App. 1-B to 5-B).

The fire was caused by the failure to employ a proper Serto ferrule fitting in the joint of a diesel fuel line connected to the vessel's generator (Pet. App. 14-B). This omission caused a pipe to separate from the generator, resulting in the discharge of flammable oil on the hot surface of the generator (*ibid*; see also *id.* at 3-B). Because of inadequate training in fighting fires and using fire extinguishing equipment, the crew failed to turn off the valves controlling the discharge of diesel oil until the fire had begun and also failed to activate the ship's fire extinguishers in time to halt the blaze (*id.* at 15-B, 3-B to 4-B).

Respondent brought suit in admiralty in the United States District Court for the Northern District of California seeking damages for loss of the cargo. Petitioners Adelaide Shipping Lines, Ltd., the owner of the vessel, and Salen Reefer Services AB, the charterer, claimed exoneration from liability on the basis of the Carriage of Goods by Sea Act, 46 U.S.C. 1304(2)(b), which absolves the owner of liability for "[f]ire, unless caused by the actual fault or privity of the carrier."



Petitioners also relied on the Limitation of Shipowners' Liability Act, 46 U.S.C. 182, which likewise exempts the owner from all liability "unless such fire is caused by the design or neglect of such owner."

The district court held that the petitioners were entitled to exoneration under these statutory provisions. The court concluded that, under these provisions, "the negligence must be on the part of the owner/charterer, or their high-level shoreside employees. The owner or charterer [is] not liable for mere crew negligence" (Pet. App. 12-A). Applying this test, the district court found that, "although a Serto ferrule should have been maintained in a particular joint" (*id.* at 9-A) and that "the crew should have been given specific instructions on the proper way to deal with engine room fires" (*id.* at 10-A), these deficiencies could not be said to be the result of "fault or neglect" of the owners or their managing agents.

The court of appeals reversed, holding that (Pet. App. 17-B to 18-B):

> The design or neglect was that of the managing officers or supervisory employees, not that of the master or crew or subordinate employees. The "design or neglect" being the failure to provide a proper compression or flange joint and to properly man and equip a trained crew prior to the commencement of the voyage.

The court of appeals reached its conclusion in partial reliance on the provisions of the Carriage of Goods by Sea Act that relate to the owner's obligation to provide a seaworthy vessel at the commencement of the voyage. These provisions (46 U.S.C. 1303-1304) require the owner to exercise due diligence in "[p]roperly man[ning] * * * the ship," an obligation that the court concluded was a prerequisite to claiming exoneration under the fire exemption provisions of 46 U.S.C. 182 and 1304(2)(b).

## DISCUSSION

In our view, the decision of the court of appeals does not conflict with prior decisions of this Court or other circuits. Further review is not required in these circumstances.

Petitioners contend (Pet. 8-18) that, under the Carriage of Goods by Sea Act, the standards for liability for unseaworthiness are different from those governing an owner's liability for loss by fire and that the court of appeals erroneously applied unseaworthiness standards to impose liability on petitioners for fire damage. Petitioners correctly observe (Pet. 8) that the obligation to render a vessel seaworthy "is non-delegable by a vessel owner and may be breached by any crew member or shoreside worker," while the provisions pertaining to fire loss require "actual fault or privity" of the owner (46 U.S.C. 1304(2)(b)), or "design or neglect" of such owner (46 U.S.C. 182)—standards that have been construed to require actual fault by the owner itself or its high-level employees (see page 8 note 5, *infra*).[1]

However, assuming *arguendo* that the court below improperly applied unseaworthiness standards in the context of fire loss, the court also concluded that in this case there was sufficient proof of owner neglect to render the fire exemption provisions inapplicable. The court explained that, whatever differences might exist between the duty to render a ship seaworthy and the duty of care required by the fire exemption provisions, those differences were "immaterial" in the present case (Pet. App. 17-B). The court held that, in failing to provide a

[1]The two standards have been construed to have the same meaning. See G. Gilmore & C. Black, *The Law of Admiralty* 163, 878 & n.87, 879 (2d ed. 1975).



properly manned crew and proper safety equipment, "the design or neglect was that of managing officers or supervisory employees, not that of the master or crew or subordinate employees" (Pet. App. 17-B to 18-B).[2] Since the court of appeals has found that petitioners would be liable in any event under the standards that they advocate, their dispute over which standards are to govern is without significance, and the only question is a factual one, which does not warrant this Court's review.[3]

Contrary to petitioners' assertion (Pet. 8, 18-19), the decision of the court of appeals does not depart from the principle adopted by other courts that the owner is liable for fire loss only in the event of his own personal dereliction or that of high-level management. The rule articulated by the court below is that "[w]here the unseaworthy conditions that were the cause of the fire damage existed by reason of owner neglect or actual fault, the exemptions created by the Fire Statute and COGSA do not apply" (Pet. App. 19-B quoting from *New York Merchandise Co.* v. *Liberty Shipping Corp.*, 509 F. 2d 1249, 1252 (9th Cir. 1975); emphasis omitted).

[2]As the court observed, "it was *incumbent upon the vessel's owners* to see that the master and the crew were fully trained in the operation and use of fire equipment." Pet. App. 18-B (emphasis in original).

[3]Although the district court was of the view that petitioners were not guilty of neglect or fault (Pet. App. 5-A), the court of appeals concluded that their failure to provide a proper ferrule fitting and to man the ship with a crew trained in fire fighting techniques was a failure to exercise reasonable care. See Pet. App. 14-B to 15-B.

Viewed in this context,[4] there is no basis for the assertion that the court's decision conflicts with the decisions of other circuits or with decisions of this Court.[5]

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[4]There are observations in the opinion of the court of appeals that, if taken out of context, could serve as the basis for novel admiralty doctrine. The court suggests at various points that the requirement of "due diligence" to make the ship seaworthy applies to master and crew as well as the owners and is an "overriding obligation" that must be fulfilled if the fire immunity provisions are to be invoked (see, *e.g.*, Pet. App. 29-B). However, the implications of these views should await further clarification in light of the narrow basis for the court's actual holding. Moreover, the present case does not appear to be an appropriate vehicle for exploring issues of burden of proof in fire loss cases since the underlying facts establishing fault on the part of the owner were either "undisputed" (*id.* at 14-B) or proven by "overwhelming evidence" (*id.* at 15-B). See also *id.* at 8-A to 10-A (district court findings that a Serto ferrule was not utilized and that the crew should have been given instructions on methods to deal with engine room fires).

[5]This Court has held that, in fire loss cases, a ship owner's liability is conditioned on his personal responsibility for the fire or that of his managing officers and agents and that vicarious liability under the general doctrine of unseaworthiness does not apply. *Earle & Stoddart, Inc.* v. *Ellerman's Wilson Line, Ltd.*, 287 U.S. 420 (1932). Accord, *Consumers Import Co.* v. *Kabushiki Kaisha Kawasaki Zosenjo*, 320 U.S. 240 (1943). The lower federal courts are in agreement that actual fault on the part of the owner must be shown as a prerequisite to liability for fire. See, *e.g.*, *Hoskyn & Co.* v. *Silver Line*, 143 F. 2d 462, 463 (2d Cir. 1944) (no liability because neglect of owner not shown as cause of fire); *American Tobacco Co.* v. *The Katingo Hadjipatera*, 194 F. 2d 449 (2d Cir. 1951); *A/S J. LUDWIG MOWINCKELS REDERI* v. *Accinanto, Ltd.*, 199 F. 2d 134, 143-145 (4th Cir. 1952) (unseaworthiness doctrine imposes no liability because fire caused by negligence of stevedores, not by the negligence of the general agent); *Asbestos Corp.*, v. *Compagnie De Navigation*, 480 F. 2d 669, 671-673 (2d Cir. 1973) (liability only if unseaworthy conditions are due to actual fault of owner and are the cause of the fire). Prior decisions of the Ninth Circuit are consistent with this rule. See *Albina Engine & Machine Works* v. *Hershey Chocolate Corp.*, 295 F. 2d 619 (9th Cir. 1961), and *New York Merchandise Co.* v. *Liberty Shipping Corp.*, 509 F. 2d 1249, 1251-1252 (9th Cir. 1975).



## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1979

# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1979

**No. 79-73**

ADELAIDE SHIPPING LINES, LTD.,
SALEN REEFER SERVICES AB, and M. V. GLADIOLA,
*Petitioners,*

vs.

SUNKIST GROWERS, INC.,
*Respondent.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF OF PETITIONERS IN REPLY TO BRIEF FOR THE UNITED STATES

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**On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF OF PETITIONERS IN REPLY TO BRIEF FOR THE UNITED STATES

In seeking the views of the United States, the Court was presumably interested in public policy, particularly as it concerns the relationship between an Act of Congress and an international convention. What the Solicitor General has submitted, however, is an analysis of the court of appeals opinion such as this Court can do (and has undoubtedly done) without advice from the Executive Department.[1]

[1]If the United States had responded to the question it was presumably asked, it might have commented on the propriety of the lower court's adopting, as it did, the construction placed on the Hague Rules by the Privy Council as a basis for ignoring express terms of an American statute.

The Solicitor General acknowledges in his footnotes 4 and 5 the importance of the question presented and the existence of the conflict if the decision is not, as he says, one of fact. We have already demonstrated in our earlier Reply Brief (pp. 1-4) that the court of appeals did not decide this case simply on the basis of a disagreement with the facts as found by Judge Orrick and, therefore, will not repeat the demonstration in order to expose the error of the Solicitor General's contrary conclusion. We are amazed, however, at his sanguine acceptance of disorderly procedures by the court of appeals. To dispose of the case on a contrary reading of the record the court of appeals would have had to reverse as clearly erroneous Finding No. 32 with respect to the ferrule and Finding No. 34 with respect to the training of the crew. It did not do so and could not plausibly do so on the evidentiary record.[2] The court itself explained its treatment of the findings otherwise when it said (Pet. App. 30-B) that "the district court's findings of fact rested upon an erroneous view of the law."

That the court of appeals expects its new standard of law to be applied in future cases is clear.[3] The result will

[2]Although the record is not before the Court at this time, we consider that this statement should be documented. It is, of course, inherently implausible that high management would be involved in the use of an improper ferrule, a small object invisible when assembled and in use, and the record is devoid of evidence that there was any management fault or neglect in the use of the ferrule. As to the training of the crew, the record shows abundant evidence from which the district court was entitled to conclude, as it did, that high management had done its part with respect to providing a trained crew. (Tr., pp. 209-12, 220-23, 242-44, 247-50, 343-45, 347-49, 354.)

[3]In its Conclusion the court of appeals said (Pet. App. 29-B): "We adopt, as the law of our circuit, the construction placed on The Hague Rules by their Lordships in THE MAURIENNE. . . ."



be a disruptive administration of admiralty law on the Pacific Coast, regardless of how ingeniously the decision may be read to avoid the necessity of review in this Court. But, if the Solicitor General's view of the court of appeals decision is to be credited, then the least this Court should do is to remand the case to that court to clarify the point and state which of Judge Orrick's findings, if any, it holds clearly erroneous. Reversal on a factual basis on the present opinion of the court of appeals would be a highly disorderly departure "from the accepted and usual course", which ought to be corrected.[4] With our knowledge of the record, we are confident that the court of appeals, with its attention focused on the point, cannot set aside the critical findings under proper standards.

The petition for certiorari should be granted on the basis of the lower court's unequivocal announcement of a standard in conflict with decisions of this Court and other courts of appeals or, in the alternative, the case should be remanded to the court of appeals with directions to clarify its decision as to whether, and on what basis, it reversed any findings of fact.

Respectfully submitted,

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[4]*See* U.S. Sup. Ct. rule 19; and *see* Dalehite v. United States, 346 U.S. 15, 24, 1953 A.M.C. 1175, 1182 n.8 (1953), discussing standards of definiteness for district court findings, which must surely apply, *mutatis mutandis*, to determinations of a court of appeals overturning such findings.